No. 09-(1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

Appeal from the United States District Courts for the Eastern District of California and the Northern District of California

JURISDICTIONAL STATEMENT

EDMUND G. BROWN JR.
ATTORNEY GENERAL OF CALIFORNIA
JAMES M. HUMES
CHIEF DEPUTY ATTORNEY GENERAL
MANUEL M. MEDEIROS
STATE SOLICITOR GENERAL
GORDON BURNS
DEPUTY SOLICITOR GENERAL
JONATHAN L. WOLFF
ROCHELLE EAST
SENIOR ASSISTANT ATTORNEYS GENERAL
KYLE A. LEWIS
DANIELLE F. O'BANNON
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JERROLD C. SCHAEFER
PAUL B. MELLO
S. ANNE JOHNSON
SAMANTHA D. WOLFF
RENJU P. JACOB
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants

*Counsel of Record

October 5, 2009

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QUESTIONS PRESENTED

1. Whether the three-judge district court had jurisdiction to issue the "prisoner release order" pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626.

2. Whether the court below properly interpreted and applied Section 3626(a)(3)(E), which requires a three-judge court to find, by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right; and . . . no other relief will remedy the violation of the Federal right" in order to issue a "prisoner release order."

3. Whether the three-judge court's "prisoner release order," which was entered to address the allegedly unconstitutional delivery of medical and mental health care to two classes of California inmates, but mandates a system-wide population cap within two years that will require a population reduction of approximately 46,000 inmates, satisfies the PLRA's nexus and narrow tailoring requirements while giving sufficient weight to potential adverse effects on public safety and the State's operation of its criminal justice system.

PARTIES TO THE PROCEEDING

Appellees are the following:

Gilbert Aviles
Steven Bautista
Ralph Coleman
Paul Decasas
Raymond Johns
Joseph Long
Clifford Myelle
Marciano Plata
Leslie Rhoades
Otis Shaw
Ray Stoderd

Intervenor-plaintiff:

California Correctional Peace Officers' Association,

Appellants are the following five defendants:

Governor Arnold Schwarzenegger
Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation
John Chiang, California State Controller
Michael Genest, Director of the California Department of Finance
Stephen W. Mayberg, Director of the Department of Mental Health

The following 146 individuals are intervenor-defendants:

Samuel Aanestad, Legislator
Anthony Adams, Legislator
Amador County Sheriff Martin Ryan
Joel Anderson, Legislator
Roy Ashburn, Legislator
Chief Probation Officer Kim Barrett

James F. Battin, Jr.*, Legislator
John Benoit, Legislator
Tom Berryhill, Legislator
Sam Blakeslee, Legislator
Police Chief Michael Billdt
Butte County Chief Probation Officer John Wardell
Butte County Sheriff-Coroner Perry L. Reniff
Calaveras County Sheriff Dennis Downum
District Attorney Ronald L. Calhoun
Chief Probation Officer Lionel Chatman
City of Alhambra Police Chief Jim Hudson
City of Atwater Police Chief Richard Hawthorne
City of Delano Chief of Corrections George Galaza
City of Delano Police Chief Mark DeRosia
City of Fremont Police Chief Craig Steckler
City of Fresno Police Chief Jerry Dyer
City of Grover Beach Police Chief Jim Copsey
City of Modesto Police Chief Roy Wasden
City of Pasadena Police Chief Barney Melekian
City of Paso Robles Police Chief Lisa Solomon
City of Roseville Police Chief Joel Neves
City of San Bernardino Police Chief Michael Billdt
City of Santa Clara Police Chief Steve Lodge
City of Sonora Police Chief Mace McIntosh
City of Vacaville Police Chief Rich Word
City of Whittier Police Chief Dave Singer

City of Woodland Police Chief Carey Sullivan
Dave Cogdill, Legislator
District Attorney Gregg Cohen
Contra Costa County Chief Probation Officer Lionel Chatman
Contra Costa County Sheriff Warren Rupf
County of San Mateo
County of Santa Barbara
County of Santa Clara
County of Solano
County of Sonoma
Paul Cook, Legislator
Dave Cox, Legislator
Police Chief Mark DeRosia
Chuck DeVore, Legislator
Del Norte County Sheriff Dean Wilson
Sutter County Sheriff Jim Denney
District Attorney Bonnie M. Dumanis
Robert Dutton, Legislator
Michael D. Duvall, Legislator
El Dorado County Sheriff Jeff Neves
Bill Emmerson, Legislator
District Attorney Bradford Fenocchio
Fresno County Chief Probation Officer Linda Penner
Fresno County Sheriff Margaret Mims
Jean Fuller, Legislator
Glenn County Sheriff Larry Jones
National City Police Chief Adolfo Gonzales
Ted Gaines, Legislator
Martin Garrick, Legislator
Police Chief Richard Hawthorne
Sheriff Pat Hedges
Dennis Hollingsworth, Legislator
Shirley Horton*, Legislator
Guy S. Houston*, Legislator
Police Chief Jim Hudson
Bob Huff, Legislator
Humboldt County Sheriff Gary Philip

Inyo County Chief Probation Officer Jim Moffet
Inyo County Sheriff William Lutze
District Attorney Edward R. Jagels
Kevin Jeffries, Legislator
Sheriff Larry Jones
Sheriff Mike Kanalakis
Rick Keene*, Legislator
Kern County Sheriff Donny Youngblood
District Attorney Robert Kochly
Doug La Malfa*, Legislator
Bill Maze*, Legislator
Lake County Sheriff Rod Mitchell
Lassen County Sheriff Steve Warren
Los Angeles County Sheriff Lee Baca
Sheriff William Lutz
Abel Maldonado, Legislator
Mariposa County Chief Probation Officer Gail Neal
Sheriff Jim Mele
Police Chief Barney Melekian
Mendocino County Sheriff Tom Allman
Merced County Sheriff Mark Pazin
Chief Probation Officer Don Meyer
Chief Probation Officer Jim Moffett
Mono County Sheriff Richard Scholl
Monterey County Sheriff Mike Kanalakis
San Joaquin County Sheriff Steve Moore
District Attorney Clifford Newell
Roger Niello, Legislator
Orange County Sheriff Coroner Michael S. Carona
District Attorney Rod Pacheco
District Attorney David W. Paulson
District Attorney Vern Pierson
Placer County Sheriff Edward N. Bonner
District Attorney John R. Poyner
District Attorney Tony Rackauckas
District Attorney Michael Ramos

District Attorney Michael Ramsey
Chief Probation Officer Brian Richart
District Attorney Todd Riebe
Riverside County Sheriff Bob G. Doyle
George Runner, Legislator
Sharon Runner*, Legislator
San Benito County Sheriff Curtis Hill
San Diego County Sheriff William B. Kolender
San Mateo County Sheriff Greg Munks
Santa Barbara County Chief Probation Officer Patricia Stewart
Santa Barbara County Sheriff Bill Brown
Santa Clara County Sheriff Laurie Smith
District Attorney Jan Scully
District Attorney Donald Segerstrom
Shasta County Sheriff Tom Bosenko
District Attorney Gerald T. Shea
Solano County Chief Probation Officer Isabelle Voit
Solano County Sheriff Gary R. Stanton
Jim Silva, Legislator
Cameron Smyth, Legislator
Police Chief Lisa Solomon
Sonoma County Chief Probation Officer Robert Ochs
Sonoma County District Attorney Stephan Passalacqua
Sonoma County Sheriff/Coroner William Cogbill
Todd Spitzer*, Legislator
Stanislaus County Chief Probation Officer Jerry Powers
Stanislaus County Sheriff Adam Christianson

Stanislaus County Sheriff's Department
District Attorney Christie Stanley
Chief Probation Officer Karen Staples
Audra Strickland, Legislator
District Attorney Gregory Totten
Van Tran, Legislator
Tehema County Sheriff Clay Parker
Ventura County Sheriff Bob Brooks
Michael N. Villines, Legislator
Mimi Walters, Legislator
Police Chief Rich Word
Mark Wyland, Legislator
Yolo County Sheriff Ed Prieto
Yuba County Sheriff Steve Durfor
Bill Berryhill, Legislator
Connie Conway, Legislator
Nathan Fletcher, Legislator
Danny Gilmore, Legislator
Curt Hagman, Legislator
Diane Harkey, Legislator
Steven Knight, Legislator
Dan Logue, Legislator
Jeff Miller, Legislator
Brian Nestande, Legislator
Jim Nielsen, Legislator

* No longer in the Legislature

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OPINIONS BELOW

The August 4, 2009 order of the three-judge district court (Reinhardt, Henderson, Karlton, J.J.) entering injunctive relief against appellants (collectively, the State) (App. 1a-256a) is unreported but is available at 2009 WL 2430820. The three-judge court's order denying the State's motion to dismiss or, in the alternative, for summary judgment (App. 257a-272a) is unreported but is available at 2008 WL 4813371. The single-judge courts' orders granting plaintiffs' motions to convene a three-judge court (App. 273a-304a) are unreported but are available at 2007 WL 2122657 and 2007 WL 2122636, respectively.

JURISDICTION

On July 23, 2007, over the State's objections, the District Courts for the Northern and Eastern Districts of California entered orders convening a three-judge district court pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(a)(3)(B), and in accordance with 28 U.S.C. § 2284. App. 10a-256a. The State contends here that the three-judge district court lacked jurisdiction to hear these cases. *Infra* at 13-18.

Following a bench trial before the three-judge court simultaneously sitting in both districts, on August 4, 2009, the court granted injunctive relief pursuant to the PLRA. App. 1a-256a. The State filed notices of appeal on September 3, 2009. App. 354a-355a. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the PLRA, 18 U.S.C. § 3626, are reproduced in the appendix (356a-358a).

STATEMENT OF THE CASE

Pursuant to the PLRA, the three-judge district court ordered injunctive relief that compels the State to cap its entire prison population at 137.5% of the institutions' design capacity within two years to address the allegedly unconstitutional delivery of medical and mental health care to specific plaintiff-classes of California inmates. By the court's own recognition, this cap—or "prisoner release order"—requires that the State reduce the population of its correctional facilities by approximately 46,000 inmates.[1] The "prisoner release order" is the first ever imposed pursuant to the PLRA over a defendant's objection. Even accounting for pre-PLRA prisoner release orders, the relief ordered by the court below is, by far, the most sweeping intrusion into a state's management of its correctional facilities in history.

This appeal presents a number of substantial questions concerning the availability and scope of "prisoner release orders" pursuant to the PLRA. Before Congress enacted the PLRA in 1996, this Court had repeatedly instructed lower courts to be extremely cautious before using their equitable powers to interfere with the legislative and executive branches' management of prisons, particularly state

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[1] Based on the evidence at the time of trial, the three-judge court estimated the prisoner reduction to be approximately 46,000 inmates. App. 235a. Because the actual prison population fluctuates over time, the estimated reduction does as well, but for simplicity we will use the 46,000 figure.

penal institutions. See, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 362-63 (1996); *Preiser* v. *Rodriguez*, 411 U.S. 475, 491-92 (1973). Cognizant of these principles, the lower courts recognized that ordering the legislative and executive branches to release prisoners or cap the population of their correctional facilities was the most intrusive form of federal court interference. See, *e.g.*, *Inmates of Occoquan* v. *Barry*, 844 F.2d 828, 843-44 (D.C. Cir. 1988). Congress nevertheless believed that further constraints on federal courts presiding over prison-conditions litigation were necessary. Therefore, it enacted the PLRA. Among other things, the PLRA permits "prisoner release orders" to be issued only by three-judge district courts, and such courts may not be convened until numerous jurisdictional prerequisites are satisfied. Additionally, three-judge courts shall not order "prisoner release" unless plaintiffs present "clear and convincing" proof that "crowding" is the "primary cause" of a violation of plaintiffs' federal rights and that "no other relief" will remedy the violation. Finally, the ability to order "prisoner release" is circumscribed by a host of nexus and narrow tailoring requirements.

This Court's full review of the questions presented by the unprecedented release order is essential to the orderly development of the law under the PLRA. A "prisoner release order," as noted, may be entered only by a three-judge court, and Congress provided this Court with sole jurisdiction over such appeals. Thus, any summary affirmance would give the three-judge court's order substantial and unwarranted influence. The decision below presents a stark break from Congress's design in the PLRA and this Court's jurisprudence regarding prison conditions and federal

court interference with the states' governance. Accordingly, probable jurisdiction should be noted.

A. Statutory Background

Enacted in 1996, the PLRA, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321, 1321-66 (1996), defines the remedial powers of the federal courts over conditions of confinement. See 18 U.S.C. § 3626. Any prospective relief ordered under the statute must be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." *Id.* § 3626(a)(1)(A); see also *id.* (relief may "extend no further than necessary to correct the violation of the Federal right of *a particular plaintiff or plaintiffs*") (emphasis added). Moreover, in considering whether such relief is appropriate, a court "shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.*

The PLRA further limits the circumstances under which a federal court is authorized to enter a "prisoner release order," one type of prospective relief, as a remedy for violations of plaintiffs' federal rights. *Id.* § 3626(a)(3); see *id.* § 3626(g)(4) ("prisoner release order" is "any order ... that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison"). Such an order may be entered only by a properly convened three-judge district court. *Id.* § 3626(a)(3)(C). A three-judge district court lacks jurisdiction to enter such an order

> unless—(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right

> sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

Id. § 3626(a)(3)(A).

If jurisdiction exists, a three-judge court "shall enter a prisoner release order only if the court finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." *Id.* § 3626(a)(3)(E).

B. Factual Background

1. The appeal involves two class actions, *Plata* v. *Schwarzenegger* and *Coleman* v. *Schwarzenegger*, concerning allegedly unconstitutional prison health care conditions. *Plata* and *Coleman* were in their remedial phases before the Northern District (Henderson, J.) and the Eastern District (Karlton, J.) of California, respectively, prior to the three-judge district court proceedings from which this appeal is taken. *Plata*, which was filed in 2001, concerns the constitutional adequacy under the Eighth Amendment and sufficiency under the Americans with Disabilities Act and the Rehabilitation Act of medical care provided to California's adult inmates with "serious medical conditions." See generally Am. Compl., *Plata*, No. C01-1351-TEH (N.D. Cal. filed Aug. 20, 2001) (Docket No. 20). *Coleman*, which originally was filed in 1990, involves allegations that the mental health care services provided to California's inmates with serious mental disorders are constitutionally inadequate. See generally Am. Compl., *Coleman*, No. CIV-S-90-0520-LKK-JFM (E.D. Cal. filed Jul. 25, 1991) (Docket No. 61).

In *Plata*, the parties negotiated a settlement of all plaintiffs' claims and entered into a stipulation for injunctive relief that was approved by Judge Henderson on June 13, 2002. See *Plata* v. *Davis*, No. C01-1351-TEH (N.D. Cal. June 13, 2002) (Docket No. 68). After several years of remedial efforts designed "'to provide only the minimum level of medical care required under the Eighth Amendment,'" App. 16a, in October 2005, Judge Henderson concluded that the prison medical system still did not meet constitutional standards, see *id.* at 14a. The court therefore took the extraordinary and unprecedented step of placing the medical health care delivery system of the California Department of Corrections and Rehabilitation ("CDCR") in a Receivership. *Id.* Judge Henderson concluded that "'[d]espite the best efforts of [the State],'" *id.* at 22a, *inter alia*, the inmates lacked access to care and specialty services, and that the CDCR: had "serious personnel problems," "was incapable of recruiting qualified personnel," "lacked medical leadership" and necessary medical equipment, had not developed or implemented tracking systems for inmates with chronic care needs, and suffered from "'a culture of non-accountability and non-professionalism.'" *Id.* at 27a-28a.

The Receiver's appointment was effective on April 17, 2006. App. 29a. The Receiver was given broad authority to manage the California prison medical care in order to "'provide[] constitutionally adequate medical care to all class members as soon as practicable.'" *Id.* at 30a. Just months later, however, plaintiffs filed a motion to convene the three-judge court to consider whether a "prisoner release order" should issue. See Pls.' Mot., *Plata*, No. C01-1351-TEH (N.D. Cal. filed Nov. 13, 2006) (Docket No. 561).

In *Coleman*, following a 1994 trial, the district court concluded that the mental health care provided to the class members violated the Eighth Amendment. App. 31a. The court found that the mental health care delivery system was inadequate in numerous respects, including its screening mechanisms, access to appropriate care, medical record system, administration of psychotropic drugs, staff competence, and suicide prevention. *Id.* at 33a-35a. Therefore, in December 1995, the court appointed a special master to oversee implementation of injunctive relief. See *id.* at 36a. In 1997, the court approved plans developed by the Special Master, and over the following years, "defendants continued to work with the Special Master to implement and revise" those plans. *Id.* at 37a. In March 2006, the *Coleman* court approved revised plans and ordered their implementation. *Id.* at 37a-38a. Eight months later, the *Coleman* plaintiffs moved to convene a three-judge court. See *id.* at 304a.

2. Over the State's objections, on July 23, 2007, the *Plata* and *Coleman* courts granted plaintiffs' motions to convene a three-judge court. See App. 273a-304a.[2] To "avoid[] the risk of inconsistent judgments," Judges Henderson and Karlton each recommended that the two different cases be heard by the same three-judge court. *Id.* at 286a, 304a. Then-Chief Judge Schroeder approved that request, and seated Circuit Judge Reinhardt to round out the panel pursuant to 28 U.S.C. § 2284. See *Coleman/Plata*, Nos. CIV-S-90-0520-LKK-JFM-P et al., slip op. at 1 (E.D. Cal./N.D. Cal. July 26, 2007) (*Coleman*, Docket

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[2] The State appealed the orders convening the three-judge court, but the Ninth Circuit dismissed the appeals for lack of jurisdiction. *Coleman* v. *Schwarzenegger*, No. 07-16361, 2007 WL 2669591, at *1 (9th Cir. Sept. 11, 2007) (per curiam).

No. 2328). Therefore, as convened, the three-judge court failed to provide as meaningful a check as Congress intended on the individual district judges' exercise of power over prison release. Cf. 141 Cong. Rec. S14407, S14414 (daily ed. Sept. 27, 1995) (Sen. Dole) (noting that the PLRA would limit the power of any federal judge to "'single-handedly'" order release); Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. Mich. J.L. Reform 79, 120 (1996) (noting that "[t]he drafters of the original legislation" authorizing three-judge district courts "thought three judges would be more sensitive to issues of federalism").

The State moved to dismiss the three-judge proceedings for lack of jurisdiction and, in the alternative, moved for summary judgment. On November 3, 2008, the three-judge court denied the State's motion. App. 272a.

Trial before the three-judge court commenced on November 18, 2008. During the trial, which continued intermittently throughout December 2008 and February 2009, the court prohibited defendants from introducing evidence "relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were 'current and ongoing.'" App. 78a n.42. Thus, the State was limited in its ability to show the advances that been made under the Receivership that had been in effect for less than a year in *Plata* and could not prove how it was implementing the *Coleman* Special Master's latest recommendations. Nor did the State have a meaningful opportunity, prior to the three-judge proceedings, to execute Assembly Bill 900, which the Governor signed into law in 2007 and authorizes, *inter alia*, eight billion dollars for the construction of

additional correctional facilities. See *id.* at 146a-150a.

Nonetheless, following trial, the court answered the fundamental "question of law" whether crowding was the "primary cause" of the underlying violations of plaintiffs' federal rights. App. 126a n.55 (internal quotation marks omitted). It held that crowding is the primary cause and that no other relief can remedy the violations. See *id.* at 78a-165a; see also 18 U.S.C. § 3626(a)(3)(E). The court therefore granted plaintiffs' request for injunctive relief. It issued a prisoner release order mandating that the system-wide population of California's prisons be capped at 137.5% of the design capacity within two years, *e.g.*, App. 169a, and estimated that the population would need to be reduced by 46,000 inmates (over 25% of the 170,000 inmates in the system), *id.* at 235a, 52a. The order required the State to provide the court, by September 18, 2009, with its plan for doing so. *Id.* at 255a, 235a.

The court concluded that a "prisoner release order" was appropriate notwithstanding its findings that other causes continue to impair plaintiffs' federal rights and that the population cap, even once fully implemented, *would not remedy* the violations to plaintiffs' rights. App. 134a, 143a. The court also concluded that the population cap satisfies the PLRA's requirements that any "prospective relief" be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right [of a particular plaintiff or plaintiffs], and is the least intrusive means necessary to correct the violation of a federal right," and that "substantial weight" be given "to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A); see App. 185a-255a.

The court reached this conclusion despite its recognition that the relief imposed "extends further than the identified constitutional violations" and "is likely to affect inmates without medical conditions or serious mental illnesses." App. 172a. Moreover, it selected the 137.5% figure solely because it was "halfway between the cap requested by plaintiffs and the wardens' estimate of the California prison system's maximum operable capacity absent consideration of the need for medical and mental health care." *Id.* at 184a. Additionally, the court acknowledged that absent effective rehabilitation programs for released inmates, studies showed that a prisoner release of this magnitude was likely to cause a statistically significant increase in crime. *Id.* at 241a-248a; see also *id.* at 185a-233a (finding no adverse impact to the criminal justice system primarily because the court concluded that "crowding" already had adverse effects on the system).

3. On September 1, 2009, the State moved the three-judge court for a stay pending disposition of an appeal to this Court pursuant to 28 U.S.C. § 1253. On September 3, 2009, the State timely noticed this appeal. App. 354a-355a. On the same day, the three-judge court denied the State's motion for a stay. *Id.* at 305a-311a. On September 4, 2009, the State filed an application for stay pending appeal with Justice Kennedy. On September 11, 2009, the application was denied. *Schwarzenegger* v. *Coleman*, No. 09A234, 2009 WL 2915066, at *1 (U.S. Sept. 11, 2009).

Therefore, on September 18, 2009, the State filed a population reduction plan with the three-judge court. App. 312a-353a. Without waiving its challenges to the three-judge court's jurisdiction to impose that

order or the order's lawfulness, *id.* at 315a, the State's plan, with additional legislative enactments, proposes to meet or bring the population below the 137.5% cap within five years, *id.* at 317a, having determined that it could not safely cap the population at 137.5% of design capacity within two years, *id.*

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents several legal questions of substantial importance regarding the prerequisites for issuing a "prisoner release order" pursuant to the PLRA, and it does so in a context that has serious consequences for public safety and our federal system. The substantial nature of these issues and the importance of the factual context is immediately clear because Congress vested this Court with exclusive jurisdiction to review any injunctive relief issued by a three-judge district court pursuant to the PLRA, including "prisoner release orders." Thus, unless this Court notes probable jurisdiction, the State of California will obtain no review at all of an unprecedented order requiring a prisoner reduction of approximately 46,000 inmates.

Moreover, a summary affirmance in this case will have precedential value in the nascent interpretation of the PLRA. See *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975) ("[T]he lower courts are bound by summary decisions by this Court '"until such time as the Court informs [them] that [they] are not."'") (alterations in original). Full review of the questions presented is exceptionally important because of the lower court's lax interpretation of the PLRA's prerequisites to ordering "prisoner release" and its readiness to micromanage the affairs of state correctional facilities.

Even before the PLRA was enacted, courts recognized that population caps represented the highest level of federal court interference with the management of prisons and thus a challenge for Our Federalism. See, *e.g.*, *Taylor* v. *Freeman*, 34 F.3d 266, 268-70 (4th Cir. 1994); *Occoquan*, 844 F.2d at 842-43 ("[A] population limit ... directly implicates decisions with which the political process is charged."); see also *Lareau* v. *Manson*, 651 F.2d 96, 111 (2d Cir. 1981) (Friendly, J., concurring in part and dissenting in part) ("the inflexible population cap imposed ... reminds me of the old saw, 'If the ship is leaking, sink it.'"). In enacting the PLRA, Congress sought to impose even greater restraints on federal court interference with prison conditions. See *Woodford* v. *Ngo*, 548 U.S. 81, 93 (2006); *Miller* v. *French*, 530 U.S. 327, 347 (2000); *Taylor* v. *United States*, 181 F.3d 1017, 1027 (9th Cir. 1999) (en banc) (Wardlaw, J., dissenting) ("When Congress enacted the PLRA, it sought to oust the federal judiciary from day-to-day prison management."). The Act takes special aim at prisoner release orders and population caps like that imposed here. See *Castillo* v. *Cameron County, Tex.*, 238 F.3d 339, 348 (5th Cir. 2001); *Gilmore* v. *California*, 220 F.3d 987, 998 & n.14 (9th Cir. 2000).[3]

If allowed to stand, the order below will interfere with the State's control of its prisons and the operation of its criminal justice system. Moreover, it will limit California's ability to set political priorities and to fund them, and will open the door to the widespread infringement of state prerogatives in the

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[3] *See also* 141 Cong. Rec. at S14414 (Sen. Dole) ("Perhaps the most pernicious form of judicial micromanagement is the so-called prison population cap."); *id.* at S14418 (Sen. Hatch); H.R. Rep. No. 104-21, at 9 (1995).

future. The PLRA, however, was enacted to prevent such damage to principles of federalism. Under the lenient approach to jurisdiction and the statutory prerequisites employed below, Congress's intent to make a "prisoner release order" the remedy of "last resort" will be subverted. This Court should act now to prevent that outcome by noting probable jurisdiction over the appeal.

I. THE THREE-JUDGE COURT LACKED JURISDICTION TO ENTER THE "PRISONER RELEASE ORDER."

The three-judge court's jurisdiction to consider a prisoner release order presents substantial questions for this Court's review. In fact, the PLRA's jurisdictional requirements were not satisfied.

Pursuant to the PLRA, only a three-judge district court may issue a prisoner release order. 18 U.S.C. § 3626(a)(3)(B). But, a three-judge court lacks jurisdiction to consider a prisoner release order unless plaintiffs demonstrate that

> (i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order, and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

Id. § 3626(a)(3)(A); see *id.* § 3626(a)(3)(C); *accord* App. 274a, 283a-285a.

As demonstrated below, the three-judge district court plainly was not properly convened. The *Plata* court failed to allot the State a reasonable amount of time to effectuate the Receiver's recent proposals, despite the Receiver's conviction that his actions would remedy the alleged constitutional violations.

The *Coleman* court also failed to provide the State a meaningful opportunity to comply with its most recent orders related to the Special Master's recommendations. Thus, the *Plata* and *Coleman* courts' orders convening a three-judge court with jurisdiction to consider a prisoner release order in these circumstances present substantial legal questions. As this Court has made clear in cases involving other aspects of the PLRA, strict compliance with the PLRA procedural requirements is essential to fulfilling Congress's goal of having fewer, more substantial suits regarding prison conditions litigated in federal court. See, *e.g.*, *Jones* v. *Bock*, 549 U.S. 199, 202-04 (2007); *Porter* v. *Nussle*, 534 U.S. 516, 523-25 (2002).

1. In *Plata*, the Northern District of California did not give the State a reasonable amount of time to comply with its orders requiring less intrusive relief before ordering the three-judge proceedings. There, the court appointed a receiver effective April 17, 2006 to take comprehensive control of CDCR's medical care system. The State immediately began working with the Receiver to address the plaintiff class's complaints. The Receiver issued his first bi-monthly report on July 5, 2006 in which he stated that his "mission[] to bring the level of medical care ... up to constitutional requirements will be done." Receiver's First Bi-Monthly Report at 33:1-3, http://www.cprinc.org/docs/court/Receiver1stBiMoR070506.pdf. He filed the second bi-monthly report on September 19, 2006, noting the "implement[ation] [of] numerous immediate and/or short term measures" designed to fulfill his mission, Receiver's Second Bi-Monthly Report at 48:25-27, http://www.cprinc.org/docs/court/Receiver/2ndBiMoR091906.pdf, and outlining the items upon which he would focus over the next 60

days, *id.* at 49:6-51:4. On November 13, 2006, the Receiver requested an extension of time in which to submit a detailed Plan of Action, explaining that it was premature to "develop[] a final corrective action plan" or "final, permanent remedial programs." Receiver's Mot. Extension at 2:2-4, 2:16-17 (capitalization omitted), *Plata*, No. C01-1351-TEH (N.D. Cal. Nov. 13, 2006) (Docket No. 559). On the same day, plaintiffs moved to convene the three-judge court.

Before ruling on the motion to convene, on December 19, 2007, Judge Henderson granted the Receiver's extension request. The Receiver filed the Plan of Action on May 10, 2007. It contemplated several years of efforts to remedy the claimed violations to the class. Although the Receiver attested that the "Plan of Action will work" and that it was "simply wrong" to think that "population controls will solve California's prison health care problems," App. 282a (quoting Receiver's Report), the court granted plaintiffs' motion to convene a three-judge court to consider a prisoner release order, *id.* at 278a-281a.

Notwithstanding its acknowledgement of Section 3626(a)(3)(A)(ii) and admission that the Receiver "has made much progress," App. 279a-280a, the court squarely held that it was not "require[d] ... to wait more time, potentially years, to see whether the Receiver's plans will succeed or fail," *id.* at 281a. The court therefore short-circuited the process it had set in motion. The court offered only the excuse that the Receiver's progress since his appointment was outweighed by what the court deemed to be insufficient progress in the years preceding the appointment. See *id.* at 280a-281a.

2. Similarly, in *Coleman*, although the district court approved new remedial plans and also required

the State to submit new plans to the Special Master, see *Coleman*, No. CIV S-90-0520-LKK (E.D. Cal. Mar. 3, 2006) (Docket Nos. 1772, 1773), the plaintiffs moved to convene a three-judge court just eight months later. Among other things, the March 2006 order required the State to submit plans for: reducing the rate of vacant psychiatrist positions across the CDCR; expanding mental health staff; providing sufficient beds for mentally ill inmates; and addressing suicide prevention. *Id.*, Docket No. 1772.

Consistent with the order, the State submitted and the court approved a stipulated process for evaluating psychiatrists. *Id.*, Docket No. 1951. The State submitted and implemented bed plans throughout summer 2006. See, *e.g.*, *id.*, Docket No. 1950. Additionally, it submitted a plan to address suicide trends in October 2006, *id.*, Docket No. 1990, and agreed to adopt many of plaintiffs' recommendations regarding that plan in December 2006, *id.*, Docket No. 2061. Furthermore, in June 2006, the *Coleman* court began ordering the State to coordinate its compliance efforts with the then-newly appointed *Plata* Receiver. See Decl. of Lisa Tillman at 3:10-13, *Coleman*, No. CIV-S-90-0529-LKK (E.D. Cal. Dec. 4 2006) (Docket No. 2063); *accord Coleman*, No. CIV-S-90-0529-LKK (E.D. Cal. June 8, 2008) (Docket No. 1834); see also, *e.g.*, *Coleman*, CIV-S-90-0529-LKK, slip op. at 3:14-16 (E.D. Cal. Oct. 20, 2006) (requiring coordination of construction) (Docket No. 1998); *Coleman/Plata*, Nos. CIV-S-90-0520-LKK et al., slip op. at 2:20-23 (E.D. Cal./N.D. Cal. Feb. 26, 2008) (same) (Docket No. 2696). Moreover, the State undertook all of these measures against the backdrop of the court's recognitions that: "[t]hrough 2005, the record ... reflected slow but evident progress toward constitutional compliance"; "some prisons in Califor-

nia came into sufficient compliance with the provisionally approved remedial plans"; and "defendants managed, through the use of aggressive recruitment and retention strategies, salary increases, and use of contract staff, to keep the vacancy rate among mental health staff at a nearly acceptable level." App. 293a.

Nevertheless, "[i]n spite of the commendable progress" made by the State in those regards, App. 294a, the court convened a three-judge court because it found that certain reversals of progress had occurred, *id.* at 295a-296a. Judge Karlton did so even as the State was working with the Special Master and plaintiffs to achieve the goals of the March 2006 order because, similar to Judge Henderson's reasoning, "[i]t has been almost twelve years since this court found widespread violations of the Eighth Amendment ... [and] Defendants have had more than sufficient time to comply with the mandate required by the court's 1995 order and the numerous orders issued since then." *Id.* at 297a.

3. Both single-judge courts' approaches are irreconcilable with even pre-PLRA case law. See *Women Prisoners* v. *Dist. of Columbia*, 93 F.3d 910, 929 (D.C. Cir. 1996) (reversing imposition of a population cap and explaining "[t]he court ... should have determined the constitutional propriety of a population cap *at the margin*—that is to say, *after its instructions concerning health and safety measures had been complied with*") (second emphasis added). Indeed, the lower courts' views were to prevail, any single-judge court would have license to find that insufficient progress at an earlier point in time vitiated any obligation to ensure that "a reasonable amount of time to comply" with more recent orders had been afforded. Cf. *Casey*, 518 U.S. at 363 & n.8.

Sometimes less intrusive measures to address constitutional violations take time. Under the PLRA, Congress plainly intended that those measures be given an ample opportunity to succeed before a three-judge court is convened to entertain much more drastic, intrusive remedies. In this case, the single-judge courts acted prematurely and therefore the three-judge court lacked jurisdiction.

II. THE COURT'S INTERPRETATION OF THE "PRIMARY CAUSE" REQUIREMENT IS CONTRARY TO THE PLRA AND WOULD GREATLY EXPAND THE AVAILABILITY OF "PRISONER RELEASE ORDERS."

A properly convened three-judge court may issue a prisoner release order "only if [it] finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation." 18 U.S.C. § 3626(a)(3)(E). The three-judge court recognized that the primary cause determination is "'a question of law.'" App. 126a n.55. The court's interpretation of Section 3626(a)(3)(E) presents substantial questions for review.

In finding that overcrowding is the primary cause of health care violations, the court below did not give the word "primary" its natural meaning; it found overcrowding a primary cause of the medical and mental healthcare inadequacies simply because it contributed to those problems. That interpretation disserves Congress's purposes and does violence to the statute's plain meaning. Moreover, in concluding that even capping the overall prison population at the level required by the court would not remedy the violation of plaintiffs' federal rights, the court below effectively nullified subsection (E)(ii)'s requirement that "no other relief ... will remedy the violation of the

Federal right." Finally, the court's entire analysis of Section 3626(a)(3)(E) was artificial because it did not analyze, and appellants were prohibited from developing and introducing evidence about, the "current and ongoing" nature of the alleged federal violations. By failing to ensure that the current conditions in the State's prisons meets Section 3626(a)(3)(E)'s requirements, the court's order lacks sufficient foundation.

1. Congress did not define the statutory phrase "primary cause," nor does the legislative history address it. See App. 79a & n.43. Although the three-judge court purported to accept the State's interpretation of the requirement, see *id.* 78a ("the cause that is 'first or highest in rank or importance; chief; principal'"), it did not in fact apply that interpretation. In finding that crowding was the "primary cause" of the alleged constitutional violations, the court below used a standard that made crowding little more than a *contributing cause* of the violations. See *Black's Law Dictionary* (9th ed. 2009) (defining "contributing cause" as "[a] factor that—though not the primary cause—plays a part in producing a result").

The court recognized that myriad causes for the alleged constitutional violations exist and that many of them pre-date the crowding now at issue. See App. 16a-17a, 31a-52a, 104a-126a; see also *Plata*, No. C01-1351-TEH, 2005 WL 2932253, at *28 (N.D. Cal. Oct. 3, 2005); *Plata*, No. C01-1351-TEH, 2005 WL 2932243, at *1 (N.D. Cal. May 10, 2005). And, the court acknowledged that curing the crowding would not remedy the alleged constitutional violations because the other, independent causes would

continue to produce constitutional injury. See App. 134a, 143a.[4]

In these circumstances, crowding plainly is not the primary cause of the alleged constitutional violations. Any reasonable construction of "primary cause" requires that crowding be the proximate and "but for" cause of the complained-of federal violations. See *Rocco* v. *Lehigh Valley R.R.*, 288 U.S. 275, 278-80 (1933) (discussing "primary" and "proximate" causation in the context of Federal Employers' Liability Act); *id.* at 280 (suggesting that the "primary cause" of an accident, in contrast to a "concurrent cause," would "preclude a finding" that the negligence of others was actionable); *The G.R. Booth*, 171 U.S. 450, 460-61 (1898) (discussing "proximate" and "primary causation"); *Metro. Pittsburgh Crusade for Voters* v. *City of Pittsburgh*, 964 F.2d 244, 251 (3d Cir. 1992) (acknowledging that a "primary cause" encompasses "but for" and "proximate" causation, and that such standards are "significantly more stringent than [a] 'material contributing factor' test") (citations omitted).[5]

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[4] Specifically, the court below found that "while other factors contribute to the unconstitutional state of the California prisons' medical and mental health care system, and while there are other steps the state must take to meet its constitutional obligations, clear and convincing evidence establishes that crowding is the primary cause of the constitutional violations." App. 143a.

[5] *See also, e.g.*, *Shyface* v. *Sec'y, HHS*, 165 F.3d 1344, 1350-53 (Fed. Cir. 1999) (holding that the Vaccine Act, which fails to define term "caused," required plaintiff to show that triggering event was a "but for" cause and a "substantial factor" in bringing about injury); *Magayanes* v. *Terrance*, 542 F. Supp. 28, 29 (N.D. Ill. 1982) (analogizing "primary" and "but for" cause), *aff'd*, 720 F.2d 682 (7th Cir. 1983); *First Nat'l Bank of Akron* v. *Cann*, 503

Indeed, in other contexts, the courts have recognized that meeting a "contributing factor" or even "substantially contributing cause" requirement presents a much lower burden than demonstrating a "primary cause." *Hawkins* v. *Dir., Office of Workers Compensation Programs*, 907 F.2d 697, 705 n.12 (7th Cir. 1990) (Black Lung Benefits Act); *Borras* v. *Sea-Land Serv., Inc.*, 586 F.2d 881, 885-86 (1st Cir. 1978) (Jones Act).

At the very least, if crowding is the primary cause, eliminating the crowding should largely extinguish the alleged constitutional violations. But, the three-judge court recognized that even absent the crowding, the plaintiffs' federal rights still would have been and would continue to be violated. This illustrates that the court's interpretation of the phrase "primary cause" is inconsistent with and undermines the PLRA.

Moreover, this interpretation nullifies the statute's additional requirement that "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E)(ii). That provision assumes that by eliminating "crowding," the prisoner release order will do what lesser relief could not: that it will "remedy the violation of the Federal right." If overcrowding is the primary cause of the constitutional violation, then it stands to reason that eliminating overcrowding necessarily will undo all or virtually all of the constitutional harm. But the record is clear that this is not so.

Before the three-judge court was convened, *Coleman* and *Plata* were not litigated as cases about crowding. The underlying alleged constitutional

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F. Supp. 419, 441 (N.D. Ohio 1980) (same), *aff'd*, 669 F.2d 415 (6th Cir. 1982).

violations involved the delivery of medical and mental health care. The thrust of orders and consent decrees entered by the single-judge courts over the years reflected that reality by directing relief, not at crowding, but at problems such as recruitment and retention of qualified personnel, medical leadership, medical equipment, screening systems, systems to track patients with needs, record keeping, and institutional culture. See, *e.g.*, App. 16a-17a, 22a-23a, 33a-36a. The *Coleman* Special Master, the *Plata* Receiver, and plaintiffs' own expert agreed that even if the crowding is remedied, these pre-existing and underlying problems will continue to cause the alleged constitutional violations.[6] The *Coleman* Special Master, for instance, concluded that "even the release of 100,000 inmates would likely leave the defendants with a largely unmitigated need to provide intensive mental health services to program populations that would remain undiminished" and that releasing 50,000 inmates would not bring the staffing resources into compliance. *Id.* at 157a-158a

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[6] *See, e.g.*, Deposition of Dr. Shansky at 61:14-24 (E.D. Cal./N.D. Cal. Dec. 10, 2007) ("Q. If the only improvement that was made in the next two years is ... there are 40,000 less inmates, no other changes other than the current status quo, would CDCR have a systemwide constitutionally adequate medical care delivery system?... A. The answer is no."); Receiver's Report re: Overcrowding at 42:24-43:1, *Plata*, No. C01-1351-TEH (N.D. Cal. filed May 15, 2007), http:///www.cprinc.org/docs/court/ReceiverReportReOvercrowding451507.pdf ("[T]hose who believe that the challenges faced by the Plan of Action are uncomplicated and who think that population controls will solve California's prison health care problems, are simply wrong."); Receiver's Turnaround Plan of Action at ii-iv, 1-20, *Plata*, No. 3:01-cv-1351-TEH (N.D. Cal. filed June 6, 2008) (Docket No. 1229) (primarily focusing on need for systemic improvements and changes to the institutional culture, not overcrowding).

(alteration omitted).[7] Moreover, plaintiffs' expert testified that CDCR could provide constitutionally adequate care for more than 172,000 inmates if other reforms were successfully implemented. See Shansky Dep. at 144:3-12.

Although the record belies the notion that crowding is the "primary cause" of what plaintiffs allege as constitutional violations, this is not to deny that crowding can exacerbate the deficiencies that caused the constitutional violations. But, at best, this makes crowding a secondary factor and an insufficient basis for a prisoner release order. See, *e.g.*, App. 299a ("*By early 2006*, the impact of severe prison overcrowding on the remedial efforts in this case was *becoming evident* in the record.") (emphasis added). The lower court's interpretation of the "primary cause" requirement, however, would allow a three-judge court to order prisoner release, as here, whenever it was frustrated with the speed or ability of less intrusive relief to remedy the violations of federal rights—even though the federal violations would continue unabated after the prisoner release occurred. See *id.* at 134a, 143a. This fails to give meaning to Congress's intent to make prisoner release "'the remedy of last resort'" under the PLRA. *Id.* at 73a. To do so, the requirements of Section 3626(a)(3)(E) must be interpreted in a manner that

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[7] Without explanation, the three-judge court brushed aside the "Special Master's statement about 100,000 inmates [as] somewhat hyperbolic." App. 158a. And, although the court found that the Special Master's comment "about 50,000 inmates more nearly approximates the remedy we deem appropriate," *id.*, it failed to heed his point that even a more considerable population reduction would not remedy the staffing deficiencies that long have been central to the violations at the heart of this litigation.

permits states every opportunity to remedy alleged federal violations by implementing measures, as here, sufficient to address the federal violations *without ordering a state to release prisoners*. See *supra* at 21-23 & n.6.

2. Regardless of how Section 3626(a)(3)(E) is interpreted, the three-judge court's findings cannot be sustained because it precluded the State from "introduc[ing] ... evidence relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were 'current and ongoing.'" App. 78a n.42; see *id.* at 77a (declining to "evaluate the [S]tate's continuing constitutional violations"). The court reasoned that there was no need to consider these issues because the single-judge district courts had "both found, without objection from defendants, that constitutional violations were ongoing" in July 2007, and "defendants ha[d] never filed a motion to terminate under § 3626(b), the proper means for any challenge to the existence of 'current and ongoing' constitutional violations." *Id.*

The three-judge court's reasoning is unsound. The State's failure to dispute whether violations were ongoing approximately *sixteen months prior to trial commencing before the three-judge court* says little about the state of the alleged constitutional violations at the time of trial, let alone at the time of the August 4, 2009 order. Indeed, the justification of the court below is especially flawed given that the State had been working with the Special Master and Receiver in the interim, and Assembly Bill 900, which, among other things, authorized funding for new prisons, was not signed into law until May 2007. Furthermore, although the State had not moved to terminate proceedings on the basis that *all* constitutional violations had been remedied, the lack of such a

motion does not answer whether some violations had been cured and what measures might be necessary to address any remaining violations.

Nonetheless, throughout the proceedings before the three-judge court, the State was prohibited from gathering and introducing evidence to counter the plaintiffs' argument that crowding is—in the present tense as the PLRA requires—the primary cause of the violation of a federal right. See 18 U.S.C. § 3626(a)(3)(E)(i).[8] Because the three-judge court failed to focus on "current and ongoing violations" and the causes of any such violations, its determination that crowding is the "primary cause" of those violations is meaningless and cannot satisfy the PLRA.

For example, the court prevented the State from showing that the previously existing federal violations had been mitigated or even remedied in the interim by measures directed at other causes. In turn, this meant that the State was unable to refute the claim that crowding was the primary cause of those violations. Similarly, had the State been permitted to develop and present evidence that previously existing unconstitutional conditions had been mitigated or extinguished by measures short of "prisoner release," it would have dispelled the notion that "less intrusive" measures could not remedy any remaining violations. Instead, the three-judge court

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[8] For instance, during trial, the court repeatedly ruled that evidence would not be allowed to prove current constitutional conditions. *See, e.g.*, Pre-Trial Hr'g Tr. at 28:16-29:2 (E.D. Cal./N.D. Cal. Nov. 10, 2008) (*Plata* Docket No. 1786); Trial Tr. at 6:24-7:9 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Plata* Docket No. 1829); Trial Tr. at 57:11-58:13 (prohibiting intervenor counsel's opening statement from continuing when he attempted to address the issue of current constitutionality).

made its "primary cause" determination without considering current conditions. Its findings thus cannot support the wide-ranging prospective relief imposed here, and, at a minimum, the issue warrants plenary review by this Court.

III. THE COURT'S INTERPRETATION OF THE PLRA'S NEXUS AND NARROW TAILORING REQUIREMENTS IS DEEPLY FLAWED.

Even if Section 3626(a)(3)(E) were satisfied, the scope of the court's release order and cap raise substantial questions worthy of this Court's attention.

The court's order imposes an inflexible population cap, 137.5% of the prisons' design capacity, that must be met within two years, meaning that California's overall prison population must be reduced by approximately 46,000 inmates. App. 169a, 235a, 255a. The PLRA, however, commands that no prospective relief, including a prisoner release order, may be entered unless it "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3826(a)(1)(A). Any such relief may "extend no further than necessary to correct the violation of the Federal right of *a particular plaintiff or plaintiffs*." *Id.* (emphasis added). In assessing these requirements, the court also "shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.*

The prisoner release order imposed here violates these nexus and narrow tailoring requirements, fails to heed this Court's teachings about the cabining of federal courts' powers over prison reform, and

improperly minimizes the potential adverse impact on public safety. But cf. App. 168a-185a (holding PLRA's narrow tailoring requirements were met); *id.* at 185a-255a (finding no unduly adversely impacts to public safety or the criminal justice system).

1. The three-judge court readily acknowledged that "the relief sought by plaintiffs extends further than the identified constitutional violations" insofar as it "is likely to affect inmates without medical conditions or serious mental illnesses." App. 172a. That is, the population cap applies to the prison population as a whole, not merely to members of the *Coleman* and *Plata* classes. On its face, therefore, the relief is not "narrowly drawn" and is broader than necessary to "correct the violation of the Federal right of ... particular ... plaintiffs," *i.e.*, the class members. 18 U.S.C. § 3626(a)(1)(A).

The decision of the three-judge court conflicts with the PLRA and is in tension with other courts' recognitions of the necessity of narrowly tailored relief. See *Hines* v. *Anderson*, 547 F.3d 915, 922 (8th Cir. 2008) (affirming termination of decree as "not narrowly drawn" under the PLRA because it addressed medical care generally, not "a particular medical problem that existed at the time"); see also *Women Prisoners*, 93 F.3d at 931 (discussing overbreadth under the PLRA); H.R. Rep. No. 104-21, at 24 n.2 (1995) ("By requiring courts to grant or approve relief constituting the least intrusive means of curing an actual violation of a federal right, the provision stops judges from imposing remedies intended to ... provide an overall improvement in prison conditions."). Furthermore, it violates equitable principles repeatedly emphasized by this Court: "'federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does

not violate the Constitution or does not flow from such a violation.'" *Missouri* v. *Jenkins*, 515 U.S. 70, 98 (1995) ("*Jenkins II*"); cf. *Casey*, 518 U.S. at 350.

Moreover, by directing the prisoner release order at *all* prisoners in California, the relief constitutes a substantial intrusion on the State's overall management of its criminal justice system, particularly with respect to CDCR. This interference flatly contravenes Section 3626(a)(1)(A)'s requirement that the court "give substantial weight to any adverse impact on ... the operation of the criminal justice system." See also 141 Cong. Rec. S2647, S2649 (daily ed. Feb. 14, 1995) (Sen. Hutchison) ("This bill will curb the ability of Federal courts to take over the policy decisions of State prisons ...."); cf. *Casey*, 518 U.S. at 364 (Thomas, J., concurring) ("[T]oo frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state correctional facilities and run them by judicial decree.").

Indeed, this significant invasion of the State's managerial prerogatives vis-à-vis the general prison population violates this Court's limits on the scope of equitable relief generally and in prison-conditions litigation specifically. Before the PLRA was enacted, this Court repeatedly made clear that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974), *overruled on other grounds by Thornburgh* v. *Abbott*, 490 U.S. 401 (1989); *accord*, *Turner* v. *Safley*, 482 U.S. 78, 84 (1987). Problems within the prisons are "peculiarly within the province of the legislative and executive branches of government," and special deference is owed, as here, where "state penal institutions are involved." *Martinez*, 416 U.S. at 405; *accord*, *Bell* v. *Wolfish*, 441 U.S. 520, 548 (1979);

Safley, 482 U.S. at 85; see *Rodriguez*, 411 U.S. at 491-92 ("It is difficult to imagine an activity in which the State has a stronger interest ... than the administration of its prisons."); *Casey*, 518 U.S. at 362-63. As this Court has remarked, "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." *Missouri* v. *Jenkins*, 495 U.S. 33, 51 (1990); see *Casey*, 518 U.S. at 362; *Rhodes* v. *Chapman*, 452 U.S. 337, 352 (1981).

This Court should review this case to ensure that the PLRA's requirements are given the meaning Congress intended and that courts are not left unduly free to impose prison population caps other than as a measure of last resort.

2. Beyond its impact on the general prison population, the 137.5% cap selected by the court below is not narrowly drawn.

At trial, plaintiffs sought a systemwide population cap of 130% of design capacity. App. 169a, 175a. The court weighed plaintiffs' proposed population cap against a 145% of design capacity figure that a State Independent Review Panel had discussed years earlier and within an entirely different context. *Id.* at 181a.[9] By the court's own admission, 145% of design capacity reflected an estimate of the level at

---

[9] *Compare* App. 56a ("'Design capacity' is the term used . . . to designate the number of inmates a prison is designed to accommodate according to standards developed by the Commission on Accreditation and the American Correctional Association."), *with id.* at 59a ("'[O]perable capacity,' refers to 'the maximum capacity of the prisons to house inmates safely and securely while providing effective education, training, and treatment.'").

which the prisons "could 'support full inmate programming in a safe and secure environment.'" *Id.* It was not the level at which the alleged constitutional violations would be remedied, see *id.* at 183a; nor did it have a nexus to the mental health and medical treatment sought by the plaintiff classes or the other remedies proposed to improve such treatment. *Id.* at 183a-184a.

Nonetheless, the court below used the two figures as the poles by which any population cap had to be measured, and imposed the 137.5% reduction simply because it split the difference between them: "137.5% of their combined design capacity—[is] a population reduction halfway between the cap requested by plaintiffs and the wardens' estimate of the California prison system's maximum operable capacity absent consideration of the need for medical and mental health care." App. 184a ("Rather than adopting the 130% limit requested by plaintiffs, we will out of caution require a reduction in the population ... to only 137.5% of their combined design capacity ....").

This is the antithesis of narrow tailoring. Indeed, the court plucked the 137.5% figure from the record despite the lack of any nexus to the constitutional problems it was addressing, even as it acknowledged expert testimony that "the Illinois prison medical system was brought into constitutional compliance at 140% design capacity." App. 181a. Moreover, the court repeatedly focused on the cap as it related to ethereal notions of adequacy, rather than the constitutional violations alleged by the plaintiff classes. See *id.* at 177a ("[N]umerous witnesses testified that a prison system must operate *below* 100% design capacity to *function properly*.") (second emphasis added); *id.* at 179a-180a (relying on testimony criticizing the 145% figure because it "'does

not meet federal guidelines nor national standards'"); see also *id.* at 183a ("plaintiffs' experts did not calculate the extent to which the operable capacity of California's prisons exceeds the percentage necessary for the provision of constitutionally adequate medical and mental health care").

This approach conflicts with the requirements imposed by this Court and applied by the courts of appeals in assessing and remedying alleged constitutional violations. As this Court stated in *Wolfish*: "[T]he recommendations of these various [professional] groups ... simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." 441 U.S. at 544 n.27; see *Rhodes*, 452 U.S. at 348 n.13. Similarly, in striking down a court-imposed population cap pre-PLRA, the District of Columbia Circuit explained, "the obvious danger of employing professional standards as benchmarks is that they ineluctably take the judicial eye off of core constitutional concerns and tend to lead the judiciary into the forbidden domain of prison reform." *Occoquan*, 844 F.2d at 837.

3. The order also lacks any connection to the Eighth Amendment violations alleged to persist at the time of the trial before the three-judge court. Thus, it cannot satisfy the statute's nexus and narrow tailoring requirements. See *Jenkins II*, 515 U.S. at 88 ("'the nature of [an equitable] remedy is to be determined by the scope of the constitutional violation'"); see also *Hines*, 547 F.3d at 920 ("Whether an Eighth Amendment violation exists and whether the decree is narrowly tailored are independent issues."). As discussed above, *supra* Part II.2, the three-judge court prohibited the State from gathering and introducing evidence regarding "current and

ongoing" alleged violations of the Constitution. Therefore, any tailoring attempted by the court below lacked the necessary factual premise. Inquiry into the nature of the alleged current federal violations was the mandatory starting point for analyzing any nexus between the violation and the remedy, and the court failed to conduct that inquiry. Thus, the court's conclusions about the necessary scope of the remedy were without the required basis in the record and cannot stand. See *Jenkins II*, 515 U.S. at 88 ("'federal-court decrees must directly address and relate to the constitutional violation itself").

4. The court not only interfered with the operation of the State's criminal justice system, it also failed to meaningfully account for the adverse impacts on public safety that the order would cause. 18 U.S.C. § 3626(a)(1)(A). A core purpose of the PLRA was to ensure that any prisoner release order provided substantial protection to the public. See *id.*; see also H.R. Rep. No. 104-21, at 9; 141 Cong. Rec. at S14418 (Sen. Hatch). The court's order requiring that the prison population be reduced by 46,000 inmates over two years does not offer sufficient protection to the public.

The three-judge court candidly acknowledged that crime was likely to increase without substantial investment in "evidence-based rehabilitation programming," App. 241a-248a—"*i.e.*, programs that research has proven to be effective in reducing recidivism," *id.* at 214a; see *id.* at 200a. However, the court did not find that such programming could be expanded or calculate the costs of expanding such programming. No evidence was presented on these points, and in light of the State's weak financial condition, it is unlikely that such programming could be made available. The three-judge court recognized

that "California has reduced spending on education, health care, the social safety net, and services for the needy, the blind, and children to the breaking point." *Id.* at 11a n.4. The court also noted that already-strained county resources would be further impacted by a prisoner release because the released inmates will displace other people currently receiving county services. *Id.* at 187a.

Nonetheless, the three-judge court simply asserted that "there are a number of population reduction measures that will not have an adverse impact on public safety ... all of which have been previously recommended to the state, in various reports, by experts it retained to examine ways to reduce California's high recidivism rate." App. 186a; but see App. 317a (concluding that the State could not safely reduce the prison population to 137.5% of design capacity within two years). The court did not address, and took no evidence concerning, the State's ability to provide the programming that the court believed was necessary to safely reduce the prison population. And considering the State's serious financial issues, it is impossible to know what resources the State will have available to provide services that released inmates would need. See generally *id.* at 328a n.10, 341a-342a (conditioning plan to reduce population on various measures by the legislature). Therefore, the court's order raises substantial questions about whether Section 3626(a)(1)(A) has been satisfied.

The court below has entered an unprecedented order that carries with it unparalleled intrusions into the ability of the State to respond to problems not only within its prison system, but also more broadly throughout California. Essentially a federal court has dictated to the State an ambitious agenda to

reform its prison system to meet a target that the court selected, at the expense of other pressing needs that the State must confront.

Congress recognized the federalism concerns inherent in such an order and accordingly required appellate review by this Court. Every issue decided by the court below is an issue of first impression. This alone provides a sufficient basis for this Court to note probable jurisdiction. But what makes the need for review particularly acute is that the court below has provided a roadmap for every court that is frustrated with the pace of judicial remedies in prison litigation simply to throw up its hands and use prisoner release as the default option. That is completely at odds with Congress's intent and demands this Court's plenary review.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

EDMUND G. BROWN JR.
ATTORNEY GENERAL OF CALIFORNIA
JAMES M. HUMES
CHIEF DEPUTY ATTORNEY GENERAL
MANUEL M. MEDEIROS
STATE SOLICITOR GENERAL
GORDON BURNS
DEPUTY SOLICITOR GENERAL
JONATHAN L. WOLFF
ROCHELLE EAST
SENIOR ASSISTANT ATTORNEYS GENERAL
KYLE A. LEWIS
DANIELLE F. O'BANNON
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JERROLD C. SCHAEFER
PAUL B. MELLO
S. ANNE JOHNSON
SAMANTHA D. WOLFF
RENJU P. JACOB
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants

October 5, 2009

*Counsel of Record

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Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

Appeal from the United States District Courts for the Eastern District of California and the Northern District of California

JURISDICTIONAL STATEMENT APPENDIX

EDMUND G. BROWN JR.
ATTORNEY GENERAL OF CALIFORNIA
JAMES M. HUMES
CHIEF DEPUTY ATTORNEY GENERAL
MANUEL M. MEDEIROS
STATE SOLICITOR GENERAL
GORDON BURNS
DEPUTY SOLICITOR GENERAL
JONATHAN L. WOLFF
ROCHELLE EAST
SENIOR ASSISTANT ATTORNEYS GENERAL
KYLE A. LEWIS
DANIELLE F. O'BANNON
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JERROLD C. SCHAEFER
PAUL B. MELLO
S. ANNE JOHNSON
SAMANTHA D. WOLFF
RENJU P. JACOB
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants

*Counsel of Record

October 5, 2009

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APPENDIX A

UNITED STATES DISTRICT COURT,
E.D. CALIFORNIA AND,
N.D. CALIFORNIA.

No. CIV S-90-0520 LKK JFM P.
No. C01-1351 TEH.

RALPH COLEMAN, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

MARCIANO PLATA, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

Aug. 4, 2009.

STEPHEN REINHARDT, *Circuit Judge*.
LAWRENCE K. KARLTON, *Senior District Judge*.
THELTON E. HENDERSON, *Senior District Judge*.

OPINION AND ORDER

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I. INTRODUCTION

"California's correctional system is in a tailspin," the state's independent oversight agency has reported. Ex. P3 at i (Jan.2007 Little Hoover Commission Report, "Solving California's Corrections Crisis: Time Is Running Out").[1] Tough-on-crime politics have increased the population of California's prisons dramatically while making necessary reforms impossible. *Id.* at ii, 2-5, 9, 20. As a result, the state's prisons have become places "of extreme peril to the safety of persons" they house, Ex. P1 at 7-8 (Governor Schwarzenegger's Oct. 4, 2006 Prison Overcrowding State of Emergency Declaration), while contributing little to the safety of California's residents, Ex. P3 at ii. California "spends more on corrections than most countries in the world," but the state "reaps fewer public safety benefits." *Id.* at 14. Although California's existing prison system serves neither the public nor the inmates well, the state has for years been unable or unwilling to implement the reforms necessary to reverse its continuing deterioration.

In this proceeding, we address two particular problems that every day threaten the lives and health of California prisoners. First, the medical and mental health care available to inmates in the California prison system is woefully and constitutionally inadequate, and has been for more than a decade. The United States Constitution does not require that the state provide its inmates with state-of-the-art medical and mental health care, nor does it require

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[1] The Little Hoover Commission is a state agency charged with preparing reports and recommendations regarding the structure and operation of state government in order to improve its economy, efficiency, and service. Cal. Gov't.Code §§ 8501, 8521-8522.

that prison conditions be comfortable. California must simply provide care consistent with "the minimal civilized measure of life's necessities," *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)—care sufficient to prevent the unnecessary and wanton infliction of pain or death, *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976). Tragically, California's inmates have long been denied even that minimal level of medical and mental health care, with consequences that have been serious, and often fatal. Inmates are forced to wait months or years for medically necessary appointments and examinations, and many receive inadequate medical care in substandard facilities that lack the medical equipment required to conduct routine examinations or afford essential medical treatment. Seriously mentally ill inmates languish in horrific conditions without access to necessary mental health care, raising the acuity of mental illness throughout the system and increasing the risk of inmate suicide. A significant number of inmates have died as a result of the state's failure to provide constitutionally adequate medical care. As of mid-2005, a California inmate was dying needlessly *every six or seven days*.

California's inmates face a second everyday threat to their health and safety: the unprecedented overcrowding of California's prisons. Since reaching an all-time population record of more than 160,000 in October 2006, the state's adult prison institutions have operated at almost double their intended capacity. As Governor Schwarzenegger observed in declaring a prison state of emergency that continues to this day, this creates "conditions of extreme peril" that threaten "the health and safety of the men and women who work inside [severely overcrowded] prisons and the inmates housed in them . . . ." Ex. P1

at 1, 8. Thousands of prisoners are assigned to "bad beds," such as triple-bunked beds placed in gymnasiums or day rooms, and some institutions have populations approaching 300% of their intended capacity. In these overcrowded conditions, inmate-on-inmate violence is almost impossible to prevent, infectious diseases spread more easily, and lockdowns are sometimes the only means by which to maintain control. In short, California's prisons are bursting at the seams and are impossible to manage.

It is the relationship between these two critical problems that lies at the heart of the cases before us. We must answer the question whether overcrowding is the primary cause of the unconstitutional medical and mental health care to which California prison inmates are currently subjected. Two federal lawsuits have brought the crisis in California's prisons to this three-judge court. Plaintiffs in the two lawsuits contend that a reduction in the prison population is necessary to bring the California prison system's medical and mental health care into constitutional compliance. In both *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger*,[2] the federal courts initially issued narrow orders requiring California to develop and implement remedial plans to meet this objective. However, as the state time and again failed to meet its own remedial targets—let alone to achieve constitutional compliance—both courts were forced to adopt increasingly drastic remedies, culminating in the *Plata* court's 2005 appointment of a receiver to manage the prison medical system. Ultimately, by

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[2] *Plata* involves the prison system's constitutionally inadequate medical care, while *Coleman* involves the constitutional deficiencies in mental health care provided to California inmates.

late 2006 it became apparent that the overcrowding in California's prisons rendered the efforts of the courts, the *Coleman* Special Master, and the *Plata* Receiver utterly insufficient. At the request of the *Plata* and *Coleman* courts, the Chief Judge of the United States Court of Appeals for the Ninth Circuit convened this three-judge court to consider the plaintiffs' request for a court-ordered reduction in the California prison population.

During the pendency of this proceeding, the outlook for California's prisons has only grown dimmer. The state is now in the throes of a fiscal crisis that renders it unable or unwilling to commit the necessary resources to fix the problems in its prisons. As Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation[3] and a defendant here, recently put it, California "cannot at this time become further indebted for correctional healthcare."[4] Ex. 1 to Defs.' July 1, 2009 Response to Court's June 18, 2009 Order, filed in *Coleman*, at 1.

Federal law makes any prisoner release order, including the population reduction order requested

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[3] Until 2005, California's adult prisons were run by the California Department of Corrections, which was a department within the state's Youth and Corrections Agency. On July 1, 2005, the agency was reorganized and renamed the California Department of Corrections and Rehabilitation ("the CDCR"). Ex. P5 at ix. In this opinion and order, we refer to the agency as the CDCR except when quoting orders issued prior to the reorganization.

[4] California has reduced spending on education, health care, the social safety net, and services for the needy, the blind, and children to the breaking point. Under these circumstances, we would be reluctant to direct the state to allocate additional funds to its prisons or to rehabilitative services at the expense of others to whom it has a legal and moral obligation.

by plaintiffs, a "remedy of last resort," H.R. Rep. No. 104-21, at 25 (1995) (report of the House Committee on the Judiciary on the Violent Criminal Incarceration Act of 1995), and imposes various conditions upon the issuance of such an order. *See* 18 U.S.C. § 3626(a)(3). As we explain below, those conditions have been met here: (1) crowding is the primary cause of the state's failure to provide its inmates with constitutionally sufficient medical and mental health care; (2) no relief besides a prisoner release order can bring the California prison system into constitutional compliance; (3) an order requiring the state to reduce the population of its adult institutions to a lower percentage of their combined design capacity than presently exists—a population cap—is narrowly tailored to the constitutional violations identified by the *Plata* and *Coleman* courts, extends no further than necessary to remedy those violations, and is the least intrusive possible remedy; and (4) the state can comply with such an order with little or no impact on public safety and the operation of the criminal justice system. There are numerous means by which the state can reduce the prison population, from parole reform and the diversion of technical parole violators and low-risk offenders to sentencing reform and the expansion of good time credits and rehabilitative programming. There is no need for the state to release presently incarcerated inmates indiscriminately in order to comply with our order. Much of the relief can be achieved instead by reducing prison intake in a manner recommended by the state's own experts.

We recognize the gravity of the population reduction order we issue herein, and we do not intervene in matters of prison population lightly. Nonetheless, when federal court intervention becomes the only

means by which to enforce rights guaranteed by the Constitution, federal courts are obligated to act. "Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist* No. 78 (Alexander Hamilton). California's prisoners have long been denied constitutionally adequate medical and mental health care, often with tragic consequences, and the overcrowding in California's prisons, which have become criminogenic, must be reduced if the prison system is to achieve constitutional compliance. California's prisoners, present and future, (and the state's population as a whole) can wait no longer.

II. FACTUAL AND PROCEDURAL BACKGROUND

Because the courts' prior remedial efforts are of profound relevance in understanding the effect of prison overcrowding and the inadequacy of forms of relief that do not address that problem, we begin with a detailed history of the individual *Plata* and *Coleman* cases. We then describe the crowded conditions in California's prison system and the history of the three-judge court proceeding before turning to the legal questions before us.

A. *Plata (Medical Care)*

The history of *Plata* involves extensive remedial efforts over the last seven years that have faltered because of the severe overcrowding in California's prisons.

The *Plata* class action was filed on April 5, 2001, and plaintiffs filed an amended complaint on August 20, 2001, alleging constitutional violations in the delivery of medical care to inmates confined in California state prisons, as well as violations of the Americans with Disabilities Act and § 504 of the

Rehabilitation Act. Ex. D1059. Plaintiffs asserted that the "unconstitutional conditions" caused by defendants' failure to "properly care for and treat the prisoners in [their] custody . . . caused widespread harm, including severe and unnecessary pain, injury and death." *Id.* ¶ 1. The *Plata* plaintiffs and defendants negotiated a stipulation for injunctive relief, which the *Plata* court approved by court order.[5]

However, defendants proved incapable of or unwilling to provide the stipulated relief. Three years after approving the stipulation as an order of the court, the *Plata* court conducted an evidentiary hearing that revealed the continued existence of appalling conditions arising from defendants' failure to provide adequate medical care to California inmates. The Court found that defendants had been given "every reasonable opportunity to bring [the] prison medical system up to constitutional standards, and it [was] beyond reasonable dispute that the State ha[d] failed." Oct. 3, 2005 Findings of Fact & Conclusions of Law Re: Appointment of Receiver ("FF & CL"), 2005 WL 2932253, at *1 (Ex. D 1063).[6] Following that hearing, the *Plata* court concluded that it had no choice but to place the CDCR's medical health care delivery system in receivership. The *Plata* Receivership continues to this date, but, as we explain below, severe crowding throughout California's prison system renders the Receiver unable to resolve the constitutional violations at issue in *Plata*.

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[5] The stipulation resolved all of plaintiffs' claims, including their Rehabilitation Act and ADA claims.

[6] All references to court orders in this section of our opinion and order are to orders filed in the district court in *Plata*.

1. *Complaint, Stipulation, and Order for Injunctive Relief*

In their amended complaint, the *Plata* plaintiffs alleged that a number of specific deficiencies in the CDCR's prison medical care system rendered the system as a whole unconstitutional. The alleged deficiencies included inadequate medical screening of incoming prisoners; delays in or failure to provide access to medical care, including specialist care; untimely responses to medical emergencies; the interference of custodial staff with the provision of medical care; the failure to recruit and retain sufficient numbers of competent medical staff; disorganized and incomplete medical records; a "lack of quality control procedures, including lack of physician peer review, quality assurance and death reviews"; a lack of protocols to deal with chronic illnesses, including diabetes, heart disease, hepatitis, and HIV; and the failure of the administrative grievance system to provide timely or adequate responses to complaints concerning medical care. Ex. D1059 ¶ 192.[7]

Prior to filing suit, the *Plata* plaintiffs had been in informal negotiations with defendants since July 1999. Ex. D 1060 ¶ 3 (June 13, 2002 Stip. & Order). After *Plata* was filed, the parties ultimately agreed to a stipulation for injunctive relief, which the *Plata* court entered as an order on June 13, 2002. Defendants agreed to and were ordered to implement certain policies and procedures on a staggered basis,

[7] As we explain below, *infra* Section II.A.2, it became apparent early in the *Plata* litigation that, given the size of their populations, California's prisons lacked the space and facilities required to deliver constitutionally adequate medical care or to remedy the above deficiencies.

with seven prisons to complete implementation in 2003. *Id.* ¶¶ 4-5. In each subsequent year, defendants were to complete implementation at five additional prisons, such that statewide implementation would be achieved by the end of 2008. *Id.* ¶ 5.[8]

The stipulated policies and procedures, which defendants filed with the *Plata* court on February 15, 2002, and supplemented on May 30, 2002, "are approximately 800 pages long and contained in 11 volumes." Mar. 10, 2003 Order at 2. Although the stipulated policies and procedures were "designed to meet or exceed the minimum level of care necessary to fulfill the defendants' obligation to plaintiffs under the Eighth Amendment of the United States Constitution," the stipulation "require[s] defendants to provide only the minimum level of medical care required under the Eighth Amendment." Ex. D 1060 ¶ 4.

The stipulation for injunctive relief provided *inter alia* for regular audits of defendants' compliance. *Id.* ¶¶ 19-23. These audits were to include a review of no less than 180 inmate health records at each prison. *Id.* ¶ 21(a). Medical assessments or treatment plans contained in those records would be deemed substantially in compliance with the settlement agreement if they were consistent with the policies and procedures or with the community standard of care "imposed under the laws of the State of California upon health

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[8] This roll-out plan did not include Pelican Bay State Prison, which was under the *Plata* court's jurisdiction in a separate action, *Madrid v. Cate*, Case No. C90-3094 TEH (N.D.Cal.), and was not included in the *Plata* case. However, on June 6, 2008, the parties stipulated, and the court ordered, that prisoners housed at Pelican Bay State Prison be included in the *Plata* class. Thus, the *Plata* case now includes all thirty-three adult institutions within the CDCR.

care providers licensed to practice in California." *Id.* ¶ 22(b) & at 11 n.3. Compliance with the agreement would also require "conducting minimally adequate death reviews and quality management proceedings," having "tracking, scheduling and medication administration systems adequately in place," and the absence of any "pattern or practice that is likely to result in serious problems [where] those problems are not being adequately addressed." *Id.* ¶¶ 22(c)-(e).

Had the stipulated policies and procedures been implemented, they would have resulted in comprehensive improvements to nearly all aspects of the medical delivery system in California's prisons, including quality management; health records management; infectious disease control; staffing; inter-institution transfers; and the timing and manner in which inmates are provided with physician and nurse care, as well as with necessary medications. Unfortunately, defendants utterly failed to comply with the implementation schedule to which they had stipulated. As of May 10, 2005, when implementation should have been completed at twelve prisons, "not a single prison ha[d] successfully completed implementation." May 10, 2005 Order to Show Cause ("OSC"), 2005 WL 2932243, at *2 (Ex. D1062). The same remains true now, more than seven years after the court approved the parties' settlement agreement. As we explain below, this is due in large part to the severe overcrowding in California's prisons.

2. *Appointment of Court Experts and Their Findings*

In addition to stipulating to an implementation schedule, the parties agreed to the appointment of medical and nursing experts "to advise the Court on the adequacy and implementation of defendants'

Policies and Procedures and any other matter that appropriately may be the subject of the experts' testimony." Ex. D1060 ¶¶ 16-17. The experts routinely reviewed defendants' progress towards implementing the stipulated injunctive relief and periodically communicated their findings and recommendations to the *Plata* court.

In their July 16, 2004 report to the court, the experts identified a pattern of serious deficiencies relating to physician quality at California prisons, and defendants agreed to address those deficiencies in a stipulation entered as an order of the court on September 17, 2004 ("Patient Care Order"), Ex. D1061.

> The Patient Care Order required defendants to engage an independent entity to (a) evaluate the competency of physicians employed by the CDCR and (b) provide training to those physicians found to be deficient. It also required defendants to undertake certain measures with respect to the treatment of high-risk patients, to develop proposals regarding physician and nursing classifications and supervision, and to fund and fill Quality Management Assistance Teams ("QMAT") and other support positions.

Oct. 3, 2005 FF & CL, 2005 WL 2932253, at *2. However, "[d]efendants failed to come close to meeting the terms of the Patient Care Order, even with generous extensions of time from the Court." *Id.* The experts noted one example of defendants' failure to comply after visits to the Substance Abuse and Treatment Facility in February and March 2005:

> [N]ot only has little progress been made in the implementation of *Plata*, but the initial morale

> and enthusiasm in utilizing QMAT has evaporated in large part because of the inability of the California Department of Corrections to provide the necessary staff and support to this process. This has delivered an unspoken message that no change will occur.

May 16, 2005 Experts' Report on Substance Abuse Treatment Center, at 3 (filed in *Plata* on May 19, 2005).

The experts' reports following visits to San Quentin State Prison were no better. Following a February 2005 visit to that facility, the court's nursing experts observed that clinics in housing areas were sometimes "nothing more than an office used by correctional officers" and "lacked basic medical equipment and supplies." Apr. 9, 2005 Nursing Experts' Report on San Quentin, at 2 (filed in *Plata* on May 10, 2005). The "[m]ost disturbing" conditions were in one unit where

> [t]he area used for nursing triage [was] a small room at the end of the tier that the nurse accesses by walking through a gate and into the men's showers. . . . Because of a clogged shower drain, standing water was present outside the clinic door. Inside, the room was filthy. The furniture was old and in disrepair. There was no examination table, medical equipment or supplies, or handwashing facilities. According to staff, equipment (otoscope [an instrument used to examine the ear]) requested for this area had been denied. As well, there was no telephone or computer access. Prior to this room being used, a broom closet on the fourth tier was used for nurse triage.

> These conditions are deplorable and have no resemblance to a medical setting whatsoever.

Id. at 2-3. Following their visits to San Quentin in January and February 2005, the medical experts noted that "[m]edical record reviews demonstrate[d] multiple instances of incompetence, indifference, cruelty, and neglect. Ten deaths were reviewed. All showed serious problems; most deaths were preventable. . . . Routine medical care [was] replete with numerous errors resulting from both system failures as well as physician mistakes." Apr. 8, 2005 Medical Experts' Report on San Quentin, at 13 (filed in *Plata* on May 10, 2005).

Perhaps most damning was the medical experts' conclusion that "overall compliance with the Stipulated Order and subsequent Court Orders was nonexistent [at San Quentin]. In fact, it was clear that for most areas we reviewed there has been indifference to beginning the process required in the Stipulated Order," *id.* at 2—despite the fact that the prison was to have *completed* that process by the time of the experts' site visit. The experts ultimately concluded that San Quentin was "so old, antiquated, dirty, poorly staffed, poorly maintained, with inadequate medical space and equipment and overcrowded that it is our opinion that it is dangerous to house people there with certain medical conditions and is also dangerous to use this facility as an intake facility." *Id.* According to the experts, "the overcrowding and facility life-safety and hygiene conditions create a public health and life-safety risk to inmates who are housed there." *Id.*

3. *Periodic Status Conferences*

Beyond receiving periodic reports from the experts, the *Plata* court also conducted regular status confe-

rences with the parties to help monitor and facilitate implementation of the stipulated injunctive relief, as well as to assess defendants' ability and willingness to comply with the court order approving such relief. Based on the experts' dismal reports of defendants' progress, the court increased the frequency of these conferences and, in February 2005, started meeting with the parties on a monthly basis. To facilitate these meetings, which typically involved large numbers of CDCR staff housed in Sacramento, the court rotated the location of these meetings between San Francisco and Sacramento.

> The Court invited the parties during [the] monthly status conferences to contribute ideas as to possible remedies, and the Court especially encouraged defendants to consider ways in which they could take the actions necessary to solve the medical care problems through measures within their own control, including use of the extraordinary powers of the Governor. The Court went to the length of requesting that defendants present it with a series of proposed orders so that the Court could help empower them to overcome some of their bureaucratic hurdles on their own. Defendants did not submit a single proposed order.

Oct. 3, 2005 FF & CL, 2005 WL 2932253, at *26 (citation omitted).

4. *Proceedings To Determine Whether a Receiver Should Be Appointed*

Ultimately, the *Plata* court found itself with no alternative but to issue an order to show cause ("OSC") why defendants should not be found in civil contempt and why a receiver should not be appointed to man-

age medical care delivery for the CDCR. As the court noted when it issued the OSC on May 10, 2005:

> In the four years since this case was filed, which includes the year and a half that this Court has been meeting with the parties on a regular basis, two things have become ever increasingly clear: (1) the Governor has appointed, and the State has hired, a number of dedicated individuals to tackle the difficult task of addressing the crisis in the delivery of health care in the California Department of Corrections ("CDC"), and, (2) despite the best efforts of these individuals, little real progress is being made. The problem of a highly dysfunctional, largely decrepit, overly bureaucratic, and politically driven prison system, which these defendants have inherited from past administrations, is too far gone to be corrected by conventional methods.
>
> The prison medical delivery system is in such a blatant state of crisis that in recent days defendants have publicly conceded their inability to find and implement on their own solutions that will meet constitutional standards. The State's failure has created a vacuum of leadership, and utter disarray in the management, supervision, and delivery of care in the Department of Corrections' medical system.
>
> Defendants have devised a long-term strategy to contract out health care management and much of the delivery of care. However, full implementation of that plan is, by defendants' own estimates, years away. In the meantime, roughly 162,000 prisoners are being subjected to an unconstitutional system fraught with medical neglect and malfeasance. Defendants themselves

> have conceded that a significant number of prisoners have died as a direct result of this lack of care, and it is clear to the Court that more are sure to suffer and die if the system is not immediately overhauled.
>
> ....
>
> Since the entry of the Stipulated Injunction in June 2002, the most notable characteristic of this case has been defendants' failure to achieve any substantial progress in bringing the medical care system even close to minimal constitutional standards.

May 10, 2005 OSC, 2005 WL 2932243, at *1-2. "Even following issuance of the OSC—on the brink of possible contempt and the imposition of a Receivership—defendants were able to enact only very limited and piece-meal measures, with no prospect for system-wide reform or restructuring." Oct. 3, 2005 FF & CL, 2005 WL 2932253, at *26.

Beginning on May 31, 2005, and concluding on June 9, 2005, the *Plata* court conducted a six-day evidentiary hearing concerning the OSC. *Id.* at *2. The court considered eighty-two exhibits, *id.*, and heard testimony from the court experts; relevant state officials, including Undersecretary of Corrections Kevin Carruth and Dr. Renee Kanan, the Acting Director of Health Care Services for the CDCR; and defendants' medical expert Dr. Ronald Shansky.[9] Following the hearing, the parties submitted legal briefs addressing both contempt and the appointment

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[9] As noted in our discussion below, although Dr. Shansky testified as defendants' expert witness in the proceedings before the *Plata* court, he testified as plaintiffs' expert witness in the proceedings before this three-judge court.

of a receiver, and several unions representing state prison medical personnel filed an amicus brief. *Id.* Defendants did not dispute that the *Plata* court had the power to appoint a receiver; instead, they argued only that a receivership was an extraordinary remedy to be used only if less intrusive remedies had failed or were likely to fail. Defs.' June 20, 2005 Response to OSC at 2, 25.

On June 30, 2005, the *Plata* court heard argument on the OSC. Oct. 3, 2005 FF & CL, 2005 WL 2932253, at *2. "Based on the arguments of counsel, the evidence presented, the full record in this case, and the Court's own observations on prison tours [of two facilities, accompanied by counsel for the parties], the Court delivered an oral ruling at the conclusion of the hearing that it would take control of the medical delivery system of the CDCR and place it under the auspices of a Receivership." *Id.*

5. *Findings of Fact and Conclusions of Law Concerning Continuing Failure To Meet Constitutional Standards and Necessity of a Receivership*

On October 3, 2005, the court issued findings of fact and conclusions of law setting forth the detailed reasoning behind its oral ruling. As the court noted in its written decision:

> By all accounts, the California prison medical care system is broken beyond repair. The harm already done in this case to California's prison inmate population could not be more grave, and the threat of future injury and death is virtually guaranteed in the absence of drastic action. The Court has given defendants every reasonable opportunity to bring its prison medical system up

> to constitutional standards, and it is beyond reasonable dispute that the State has failed. Indeed, it is an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the CDCR's medical delivery system. This statistic, awful as it is, barely provides a window into the waste of human life occurring behind California's prison walls due to the gross failures of the medical delivery system.
>
> It is clear to the Court that this unconscionable degree of suffering and death is sure to continue if the system is not dramatically overhauled. Decades of neglecting medical care while vastly expanding the size of the prison system has led to a state of institutional paralysis. The prison system is unable to function effectively and suffers a lack of will with respect to prisoner medical care.

Id. at *1.

In its order, the court identified a number of serious problems in the care provided to inmates. The court found that the CDCR failed to follow its own policies regarding access to medical care, and inmates routinely lacked timely access to care, both in terms of screening requests and in receiving care once it was determined that an appointment with a physician was warranted. *Id.* at *13. Inmates needing specialty services to treat serious medical problems were forced to wait inordinate and inexcusable amounts of time for appointments; at one prison, inmates with consultation referrals from early 2004 had yet to be seen in May 2005. *Id.* at *16. In addition, the CDCR had failed to develop or implement a system to track and treat inmates with chronic care

needs, *id.* at *14, and the court's nursing expert found that CDCR nurses often "fail[ed] to perform basic functions," such as taking vital signs, conducting examinations, and identifying urgent medical issues requiring immediate referral to a physician. *Id.* at *9.

Not unexpectedly, death reviews revealed "repeated gross departures from even minimal standards of care." *Id.* at *7. The lack of adequate care also resulted in "an inordinately high level of morbidity," defined as "any significant injury, harm or medical complication that falls short of death," among CDCR inmates. *Id.* at *8-9. For example:

> [I]n 2004 a San Quentin prisoner with hypertension, diabetes and renal failure was prescribed two different medications that actually served to exacerbate his renal failure. An optometrist noted the patient's retinal bleeding due to very high blood pressure and referred him for immediate evaluation, but this evaluation never took place. It was not until a year later that the patient's renal failure was recognized, at which point he was referred to a nephrologist on an urgent basis; he should have been seen by the specialist within 14 days but the consultation never happened and the patient died three months later.

Id. (citations omitted). This incident was simply a "representative example[ ]" of the grossly inadequate care that could be found throughout the prison system. *Id.* at *6. Many prisoners were the victims of similar treatment, or worse.

Beyond these quality of care problems, the court noted a number of additional deficiencies in the

prison medical system. Prison medical facilities "lack[ed] the necessary medical equipment to conduct routine examinations and to respond to emergencies," *id.* at *15, and were also "completely inadequate for the provision of medical care":

> Many clinics [did] not meet basic sanitation standards. Exam tables and counter tops, where prisoners with infections such as Methicillin-Resistant Staph Aureus (MRSA) and other communicable diseases are treated, [were] not routinely disinfected or sanitized. Many medical facilities require[d] fundamental repairs, installation of adequate lighting and such basic sanitary facilities as sinks for hand-washing. In fact, lack of adequate hygiene ha[d] forced the closure of some operating rooms.

Id. at *14 (citations omitted). Likewise, the management of prison pharmacy operations was "unbelievably poor." *Id.* at *16. No statewide coordination between pharmacies existed, and there were "serious, long-standing problems with dispensing medication, renewing prescriptions, and tracking expired prescriptions." *Id.* Medical records in most CDCR prisons were "either in a shambles or non-existent. . . . mak[ing] even mediocre medical care impossible," *id.* at *14 (citation omitted), and the resulting lack of access to inmates' medical histories "result[ed] in dangerous mistakes, delay in patient care, and severe harm." *Id.* Furthermore, the reception center intake process, which was designed to allow medical staff to identify inmates' medical issues, including communicable diseases posing a risk of transmission to other inmates and staff, was woefully inadequate. *Id.* at *12-13.

The court also noted a number of serious personnel problems. Qualified medical staff were sorely lacking at every level. According to one court expert, "20-50% of physicians at the prisons provide[d] poor quality of care." *Id.* at *5. However, the CDCR was incapable of recruiting qualified personnel to fill the significant vacancies that existed throughout the system, *id.* at *11, and the CDCR's lack of a medical credentialing policy resulted in many CDCR clinicians' practicing outside of their areas of medical expertise. *Id.* at *21. The CDCR also lacked medical leadership, both at the central office and at individual prisons, and the resulting lack of supervision "foster[ed] a culture of non-accountability and non-professionalism whereby the acceptance of degrading and humiliating conditions bec[ame] routine and permissible." *Id.* at *10 (internal quotations, citation, and alteration omitted).

Bases on these findings, the *Plata* court concluded that "the establishment of a Receivership, along with those actions necessary to effectuate its establishment, are narrowly drawn to remedy the constitutional violations at issue, extend no further than necessary to correct a current and ongoing violation of a federal right, and are the least intrusive means to correct these violations." *Id.* at *33. The court recognized that:

> the imposition of a Receivership is a drastic measure. But it is not a measure that the Court has sought, nor is it one the Court relishes. Rather, the Court is simply at the end of the road with nowhere else to turn. Indeed, it would be fair to say that the Receivership is being imposed on the Court, rather than on the State, for it is the State's abdication of responsibility that has

> led to the current crisis. Since the Court has jurisdiction over this matter, it has no choice but to step in and fill the void.

Id. at *31 (citation omitted). The court held the contempt remedy in abeyance after concluding that a finding of contempt was not a prerequisite to the appointment of a receiver. *Id.* at *33. Nevertheless, it sought to employ all feasible means other than a prisoner release to remedy the constitutional violations.

6. *Interim Remedies*

On plaintiffs' motion, the court considered appointing a temporary receiver but ultimately opted instead to appoint a correctional expert pending the search for and appointment of a receiver. *Id.* at *34-35. On November 14, 2005, the Correctional Expert filed a report and recommendations on interim remedies concerning clinical staffing and death reviews. "[T]he Correctional Expert's report powerfully underscore[d] the depth of the crisis in the delivery of health care services in the CDCR . . . ." Ex. D1065 at 1 (Dec. 1, 2005 Order). Over defendants' objections, the court ordered a series of "discrete, urgently needed, remedial measures that could be undertaken immediately" to improve recruitment and retention of clinical staff. *Id.* at 1, 6-15.

7. *Appointment of the Plata Receiver*

With the parties' participation, the *Plata* court engaged in a national search for a receiver. On February 14, 2006, the court appointed Robert Sillen as Receiver, with an effective date of April 17, 2006. In its order of appointment, the court conferred broad authority on the Receiver to "provide leadership and executive management of the California prison

medical health care delivery system with the goals of restructuring day-to-day operations and developing, implementing, and validating a new, sustainable system that provides constitutionally adequate medical care to all class members as soon as practicable." Ex. P313 at 2 (Feb. 14, 2006 Order). The Receiver was assigned "the duty to control, oversee, supervise, and direct all administrative, personnel, financial, accounting, contractual, legal, and other operational functions of the medical delivery component of the CDCR," *id.*, and was granted "all powers vested by law in the Secretary of the CDCR as they relate to the administration, control, management, operation, and financing of the California prison medical health care system." *Id.* at 4. On January 23, 2008, the Court appointed J. Clark Kelso to replace Sillen as Receiver, and he has served in that capacity to date.

The Receivers have implemented substantial changes in the CDCR's prison medical care system and have issued regular reports documenting their progress. For example, the Receiver has increased recruitment and retention of clinical staff, implemented a new pharmacy system, and instituted pilot programs to improve medical screening at reception centers and management of chronic care. Nonetheless, as we describe below, fundamental unconstitutional deficiencies, caused primarily by overcrowding, continue to exist and prevent the delivery of constitutionally adequate medical care to California's inmates.

B. *Coleman (Mental Health Care)*

While the *Plata* court has struggled to bring the CDCR's medical system into constitutional compliance for more than seven years, the *Coleman*

action has lasted even longer—almost two decades. The first five years of litigation culminated in a finding that the CDCR was violating the Eighth Amendment by failing to provide constitutionally adequate mental health care to inmates with serious mental disorders. The past fourteen years have involved continual efforts to remedy the constitutional violations.

At the time of the *Coleman* trial, the Eighth Amendment violations stemmed in large part from the state's complete failure to identify with any accuracy the number of mentally ill inmates in the prison population, despite several expert reports addressing the issue. Early in *Coleman*'s remedial phase, the state developed a screening mechanism to identify mentally ill inmates and plans for a system that could deliver mental health care to the thousands of inmates suffering from serious mental disorders. There are currently over 34,000 inmates identified as seriously mentally ill in the state's prisons. Ex. P243 at 900124 (collection of monthly CDCR mental health population placement reports, dated between December 2006 and August 2008). However, California remains unable to deliver constitutionally adequate mental health care for these inmates.

After fourteen years of remedial efforts under the supervision of a special master and well over seventy orders by the *Coleman* court, the California prison system still cannot provide thousands of mentally ill inmates with constitutionally adequate mental health care, and "critically mentally ill inmates [are] languishing in horrific conditions without access to immediate necessary mental health care." May 2,

2006 Order at 2.[10] The relentless growth of the inmate population has prevented the state from meeting its obligations under the Eighth Amendment and has led, inexorably, to the proceeding before this court.

1. *Findings of Eighth Amendment Violations*

The *Coleman* action was filed on April 23, 1990. On July 25, 1991, plaintiffs filed an amended complaint, Ex. D1036, raising claims under the Eighth and Fourteenth Amendments to the United States Constitution and the Rehabilitation Act, 29 U.S.C. § 794. These claims were based on serious inadequacies in the delivery of mental health care to inmates in the California adult prison system. *Id.* The *Coleman* court subsequently certified a class consisting of inmates with serious mental disorders.[11]

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[10] All references to court orders in this section of our opinion and order are to orders filed in the district court in *Coleman*. *Coleman* docket numbers are listed when multiple, untitled orders were issued on the same day.

[11] The class certified in 1991 consisted of "all inmates with serious mental disorders who are now or who will in the future be confined within the California Department of Corrections (except the San Quentin State Prison, the Northern Reception Center at Vacaville and the California Medical Facility-Main at Vacaville)." Nov. 14, 1991 Order at 4-5. On July 12, 1995, the *Coleman* class was decertified as to the Rehabilitation Act claim, which was dismissed with prejudice. July 12, 1995 Order at 2. The class definition was subsequently amended to include "all inmates with serious mental disorders who are now, or who will in the future, be confined within the California Department of Corrections." July 23, 1999 Order & Stip. & Order Amending Plaintiff Class & Application of Remedy appended thereto at 2.

> Inmates suffering from "serious mental disorders" include those with "Organic Brain Syndrome-Severe, Schizophrenia, Major Depression [or] the Bipolar Disorders," those who "currently or within the last three years . . . [have]

Nov. 14, 1991 Order at 4-5. The matter proceeded to trial before a United States Magistrate Judge, and in June 1994 the magistrate judge found that defendants' delivery of mental health care to class members violated the Eighth Amendment. On September 13, 1995, the district court adopted the magistrate judge's decision, with modifications. *Coleman v. Wilson*, 912 F.Supp. 1282 (E.D. Cal. 1995).[12]

In adopting the magistrate's findings, the *Coleman* court identified several significant deficiencies in the delivery of mental health care to California's inmates. First, the court found delays in access to necessary mental health care "at each level of the mental health care delivery system as it exist[ed] in the CDC," which "result[ed] in exacerbation of illness and patient suffering." *Id.* at 1308, 1309. Evidence specifically noted by the *Coleman* court included "backlogs of 300-400 inmates awaiting transfer to enhanced outpatient programs at California Men's Colony [('CMC')] or California Medical Facility [('CMF")]" and a defense exhibit describing "the problem of the backlog of male inmates awaiting transfer to CMF and CMC for mental health services"

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had a significant disorder of thought or mood which substantially impairs or substantially impaired reality testing, judgment or behavior," and those who "currently do[ ] not have the ability to meet the functional requirements of prison life without psychiatric intervention, including psychotropic medication." *Coleman*, 912 F.Supp. at 1300 nn.15-16 (internal quotations and citations omitted).

[12] The district court's order was issued following *de novo* review by that court of the magistrate judge's findings and recommendations. *Coleman*, 912 F.Supp. at 1293, 1297.

as "approaching the crisis level." *Id.* at 1309 (internal quotations omitted).

In addition, defendants did not have "a systematic program for screening and evaluating inmates for mental illness." *Id.* at 1305. Instead, they relied on mechanisms that were "either used haphazardly, or depend[ed] for efficacy on incomplete or non-existent medical records, self-reporting, or the observations of custodial staff inadequately trained in the signs and symptoms of mental illness." *Id.* at 1305-06. As a result, "thousands of inmates suffering from mental illness [were] either undetected, untreated, or both." *Id.* at 1306.

Furthermore, the *Coleman* court found that "defendants' supervision of the use of medication [was] completely inadequate; prescriptions [were] not timely refilled, there [was] no adequate system to prevent hoarding of medication, . . . inmates on psychotropic medication [were] not adequately monitored, and it appear[ed] that some very useful medications [were] not available because there [was] not enough staff to do necessary post-medication monitoring." *Id.* (internal quotations and citation omitted); *see also id.* at 1310. The court also found violations of a constitutional magnitude in the involuntary medication of inmates. *Id.* at 1313. In addition, the court found significant deficiencies in medical record keeping, "including disorganized, untimely and incomplete filing of medical records, insufficient charting, and incomplete or nonexistent treatment plans" at most prisons. *Id.* at 1314 (internal quotations and citation omitted); *see also id.* at 1315. The court found that "inmates [were] typically transferred between prisons without even such medi-

cal records as might exist." *Id.* at 1314 (internal quotations and citation omitted); *see also id.* at 1315.

The *Coleman* court also found that "the California Department of Corrections [was] significantly and chronically understaffed in the area of mental health care services." *Id.* at 1307. Relying on the testimony of a defense expert, the *Coleman* court further found that "defendants [could not] provide adequate mental health care without some form of quality assurance" program to ensure the competence of their mental health care staff, but that the CDCR lacked any such program. *Id.* at 1308.

These findings led the *Coleman* court to conclude that defendants lacked all of the "basic, essentially common sense, components of a minimally adequate prison mental health care delivery system," *id.* at 1298 (citing *Balla v. Idaho State Bd. of Corr.*, 595 F.Supp. 1558, 1577 (D. Idaho 1984) (citing *Ruiz v. Estelle*, 503 F.Supp. 1265, 1339 (S.D. Tex. 1980)), including proper screening; timely access to appropriate levels of care; an adequate medical record system; proper administration of psychotropic medication; competent staff in sufficient numbers; and a basic suicide prevention program. *Id.* at 1298 n.10. The Coleman court found that the CDCR was seriously deficient in each of the first five components and that the CDCR's suicide prevention program was adequate in design but inadequately implemented due to severe and chronic understaffing throughout the CDCR. *Id.* at 1305-15.[13]

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[13] In addition, the *Coleman* court found "inappropriate use of disciplinary and behavioral control measures directed towards the members of plaintiff class." *Id.* at 1319-20. Seriously mentally ill inmates were "being treated with punitive measures

On the basis of its findings, the *Coleman* court entered an order for injunctive relief requiring defendants to develop plans to remedy the constitutional violations under the supervision of a special master. *Id.* at 1323-24; *see also* Fact # 5, Nov. 17, 2008 Joint Statement of Undisputed Facts.

2. *Remedial Orders*

On December 11, 1995, the *Coleman* court appointed a special master to oversee the remedial phase of the action. Dec. 11, 1995 Order Appointing a Special Master at 2. The specific duties of the Special Master included working with defendants to develop a remedial plan to address the constitutional violations identified by the court, monitoring defendants' implementation of and compliance with the remedial plan, and submitting interim reports on the progress of the remedial plan and defendants' compliance. Dec. 11, 1995 Order of Reference at 3-4.

Eighteen months later, the Special Master submitted a report to the court accompanied by remedial

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by the custody staff to control the inmates' behavior without regard to the cause of the behavior" because custody staff was "inadequately trained in the signs and symptoms of serious mental illness." *Id.* at 1320. Defendants' placement of *Coleman* class members in administrative segregation and segregated housing units ("SHUs") was found to violate the Eighth Amendment because mentally ill inmates were placed in such units "without any evaluation of their mental status, because such placement [caused] further decompensation, and because inmates [were] denied access to necessary mental health care while they [were] housed in administrative segregation and/or segregated housing." *Id.* at 1320 (internal quotations and citation omitted). The court also found unconstitutional defendants' policy permitting the use of tasers and 37mm guns on *Coleman* class members without consideration of the impact of such measures on mental illness. *Id.* at 1321-23.

plans, policies, procedures, and forms collectively identified as the Mental Health Services Delivery System Program Guides (hereafter "Program Guides"). June 6, 1997 Special Master's Report on Plans, at 1-2.[14] The court accepted the Special Master's report, ordered two specific modifications recommended by the Special Master, gave provisional approval to the Program Guides, and directed the Special Master to "forthwith commence 'monitoring defendants' implementation of and compliance with" the delivery of mental health care services as set forth in the Program Guides. June 27, 1997 Order at 2-3.

Following the court's provisional approval of the Program Guides, defendants continued to work with the Special Master to implement and revise the guides.[15] In early 2006, the Special Master submitted a report and recommendations regarding a Revised Program Guide that defendants concurrently submitted for final approval. *See* Jan. 2006 Revised Program

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[14] A reformatted copy of the Program Guides was filed in January 1998. *Coleman* docket # 913.

[15] As the *Coleman* Special Master explained when defendants' Revised Program Guide was submitted for final approval, at the start of the remedial phase "the basic program guides were a work in progress, hence their provisional adoption. Many of the programmatic components of the defendant's mental health system were still embryonic and needed much nurturing. . . . All agreed that their implementation needed close scrutiny and analysis over the next several years. During the subsequent implementation process, many aspects of the provisionally approved plans, policies, and protocols were revisited and amended by the court, while some other provisions were modified and upgraded by the defendants on their own initiative." Feb. 3, 2006 Special Master's Report & Recommendations on Defs.' Revised Program Guide at 2.

Guide (*Coleman* docket # 1753). On March 3, 2006, the *Coleman* court gave final approval to all undisputed provisions of the Revised Program Guide and ordered their immediate implementation. Mar. 3, 2006 Order at 1-2.[16]

Operating under the framework established by the Program Guides, the *Coleman* court has engaged in extensive efforts to address the identified constitutional violations through means other than a prisoner release order. Since June 1997, the *Coleman* Special Master has filed twenty monitoring reports and fifty-six other reports. During the same period, the *Coleman* court has issued well over seventy orders

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[16] The Revised Program Guide approved by the *Coleman* court in March 2006 contains specific provisions for an annual revision process. *See* Jan. 2006 Revised Program Guide (*Coleman* docket # 1753-2) at 12-1-14; *see also* Dezember Trial Aff. ¶ 24 ("The Program Guide is now subject only to an annual revision process."). The *Coleman* court has specifically approved at least one additional modification to the Revised Program Guide. *See* Sept. 11, 2006 Stip. & Order at 3.

> The parties have offered three separate versions of the Revised Program Guide into evidence. Defendants have offered as Exhibit D 1147 a document they represent to be the Revised Program Guide approved by the *Coleman* court in March 2006. *See* Dezember Trial Aff. ¶ 16. Plaintiffs have offered as Exhibit P9 a document identified as the September 2006 Revised Program Guide. Defendants have also offered as Exhibit D 1148 a version of the 2008 Revised Program Guide to which is appended a redline document showing edits from a Draft August 2008 revision. Defendants represent that at the time of filing the 2008 Revised Program Guide had been through "the annual revision process to enable [its] publication" and that "distribution of the final 2008 Revised Program Guide to the field [was] in the offing." Dezember Trial Aff. ¶ 24. Unless otherwise noted, all citations in this opinion and order are to the 2008 Revised Program Guide, Ex. D1148.

concerning the matters at the core of the remedial process. As discussed in detail below, the vast majority of the orders by the *Coleman* court have been directed at accurately projecting short-, medium-, and long-range bed needs; creating a sufficient number of beds at the higher levels of the mental health care delivery system; reducing delays in transfers to necessary levels of care; and ensuring adequate staffing.[17] In addition, the court has issued several orders addressing deficiencies at specific institutions.[18] Finally, the court has issued several

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[17] At the earliest stages of the remedial phase, the Special Master reported that defendants' plan for screening inmates at reception centers represented a "vast improvement" over the screening procedures that existed at the time of trial, and that defendants had chosen an effective screening instrument. Mar. 12, 1996 First Report of the Special Master on the Remedial Plan at 6-7. Implementation of screening practices was slow at the start of the remedial phase, but by mid-1997 defendants' screening process had improved. Evidence offered at the *Coleman* trial showed that, in July 1987, approximately 2,966 inmates had been identified with a psychiatric classification and/or placement in psychiatric facilities used by the CDCR, while, conservatively, over 4,000 inmates with serious mental disorders were undetected. *See Coleman*, 912 F.Supp. at 1306 n. 29. By July 1997, 14,293 inmates with serious mental disorders had been identified. *See* Feb. 3, 2006 Special Master's Report & Recommendations on Defs.' Revised Program Guide at 2. The Special Master's second monitoring report, filed in October 1998, reflected increasing institutionalization of, and compliance with, the mental health screening system, *see* Ex. D1108 (compilation of summaries and recommendations from the *Coleman* Special Master's twenty monitoring reports) at DEFS059840-DEFS059849. By August 2008, there were 34,319 inmates with serious mental disorders identified in California's prison system. Ex. P243 at 900124.

[18] *E.g.*, Nov. 19, 1998 Order at 1-2 (regarding California Rehabilitation Center ("CRC"), Mule Creek State Prison ("Mule Creek"), Salinas Valley State Prison ("SVSP"), Wasco State

orders concerning suicide prevention efforts, including, in the last five years, orders addressing a rising number of inmate suicides, particularly in administrative segregation units.[19]

a. Mental Health Care Beds and Treatment Space

As the remedial phase of *Coleman* began and thousands of inmates with serious mental disorders were identified, the need for additional treatment space at every level of the mental health care

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Prison ("Wasco"), Deuel Vocational Institution ("DVI"), California Institution for Men ("CIM"), California Institution for Women ("CIW"), and California State Prison-Solano ("CSP-Solano")); Oct. 26, 2001 Order at 1-2 (regarding California Substance Abuse Training Facility ("SATF") and California State Prison-Los Angeles County ("CSP-LAC")); Apr. 25, 2002 Order at 2-3 (regarding CSP-LAC); June 13, 2002 Order (*Coleman* docket # 1384) at 1-2 (regarding CIM, SATF, California State Prison-Corcoran ("CSP-Corcoran"), CSP-LAC, CSP-Solano, San Quentin State Prison ("San Quentin"), and SVSP); Mar. 8, 2005 Order at 3-4 (regarding CSP-Corcoran, San Quentin, and Richard J. Donovan Correctional Facility ("R.J.Donovan")).

[19] *E.g.*, Dec. 22, 2000 Order at 4 (requiring Special Master to report on whether defendants have adequate mechanisms for disciplining staff whose conduct contributes to inmate suicide); Oct. 1, 2001 Order at 2 (directing implementation of Suicide Reporting and Review Policy); Jan. 12, 2004 Order at 2-3 (requiring several training and planning measures for suicide prevention); June 10, 2005 Order at 1-2 (*Coleman* docket # 1668) (requiring implementation of several suicide prevention measures); June 8, 2006 Order at 2-3 (requiring defendants to develop a plan to deal within [sic] rising percentage of suicides in administrative segregation and a budget and implementation schedule); Aug. 8, 2006 Stip. & Order at 1-2 (regarding use of video-monitoring for suicide watch observation); Sept. 11, 2006 Stip. & Order at 3 (extending time to submit final plan regarding suicides in administrative segregation).

delivery system became manifest. *See* Ex. D1292 (Special Master's Response to Court's May 17, 2007 Request for Information) at 5 (noting emergence in mid-and late-1990s of a "need for much expanded mental health care and the space needed to provide it").[20]

At the time of the *Coleman* trial, mental health care delivery to inmates in California's prison system was "limited to a few institutions and involved some 3,200 designated mental health care beds," Defs.' Proposed Finding of Fact # 45 (citing Ex. D1273 at 43-44; Dezember Trial Aff. ¶ 70), including beds for inpatient hospital care provided by the Department of Mental Health ("DMH") at CMF and Atascadero State Hospital. Dezember Trial Aff. ¶ 70. After the *Coleman* trial, defendants undertook to implement plans

> for the delivery of a continuum of mental health services, including long-term inpatient care (provided through the department's contract with the California Department of Mental Health), short-term inpatient care (the department's Mental Health Crisis Bed program), intensive outpatient care (the Enhanced Outpatient Program) and routine outpatient care (the Correctional Clinical Case Management program).

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[20] Plaintiffs also offered this document into evidence as Exhibit P35. Because we discuss the reports of the *Coleman* Special Master and the *Plata* Receiver throughout this opinion and order, we note that, at trial, both plaintiffs and defendants introduced various reports from the Receiver and the Special Master without objection.

Mar. 12, 1996 First Report of the Special Master on the Remedial Plan at 2-3. Defendants planned regional mental health care service areas, with "[i]nitial entry to the service continuum . . . provided primarily through a uniform screening process" at each of the CDCR's reception centers.[21] *Id.* at 3.

Defendants' remedial plans were built around the Mental Health Services Delivery System ("MHSDS") set forth in the original Program Guides and the Revised Program Guide. The MHSDS is designed to provide mental health care to all inmates with current symptoms of any of the Axis I serious mental disorders identified in the current Diagnostic and Statistical Manual,[22] inmates who need mental health treatment "to protect life and/or treat significant disability/dysfunction" resulting from a diagnosed or suspected mental disorder, and inmates with a diagnosis or recent episode of exhibitionism. Ex. D1148 at 12-1-6. The MHSDS has the same basic structure as the "embryonic"[23] system first reported by the *Coleman* Special Master in March 1996. The system is designed around four levels of care: the Correctional Clinical Case Management Services

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[21] We describe reception centers in more detail below when we discuss whether crowding is the primary cause of the constitutional violations at issue. *See infra* Section IV.B.1.

[22] As listed in the Revised Program Guide, these are: Schizophrenia (all subtypes); Delusional Disorder; Schizophreniform Disorder; Schizoaffective Disorder; Brief Psychotic Disorder; Substance-Induced Psychotic Disorder (excluding intoxication and withdrawal); Psychotic Disorder Due to a General Medical Condition; Psychotic Disorder Not Otherwise Specified; Major Depressive Disorders; and Bipolar Disorders I and II. Ex. D1148 at 12-1-6.

[23] Feb. 3, 2006 Special Master's Report & Recommendations on Defs.' Revised Program Guide at 2.

program ("CCCMS" or "3CMS"), the Enhanced Outpatient Program ("EOP"), Mental Health Crisis Bed ("MHCB") Placement, and DMH Inpatient Hospital Care. Ex. D1148 at 12-1-7 to 12-1-9.[24]

A significant amount of remedial effort in *Coleman* has been spent on the as yet unsuccessful endeavor to develop a sufficient number of mental health care beds at the EOP, MHCB, and inpatient levels of care,[25] as well as to provide adequate treatment space for all inmates with serious mental health disorders.[26] The *Coleman* court has issued numerous

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[24] The CCCMS level of care is for inmates whose symptoms are under control or in partial remission and can function in the general prison population, administrative segregation, or segregated housing units. Ex. D 1148 at 12-1-7. The EOP level of care is for inmates who suffer "Acute Onset or Significant Decompensation of a serious mental disorder characterized by increased delusional thinking, hallucinatory experiences, marked changes in affect, and vegetative signs with definitive impairment of reality testing and/or judgment," and who are unable to function in the general prison population but do not require twenty-four hour nursing care or inpatient hospitalization. *Id.* at 12-1-7 to 12-1-8. MHCBs are for inmates who are markedly impaired and/or dangerous to others as a result of mental illness, or who are suicidal, and who require 24-hour nursing care. *Id.* at 12-1-8 to 12-1-9. The MHCB level of care is also for inmates "awaiting transfer to a hospital program" and for inmates "being stabilized on medication prior to transfer" to a lower level of care. *Id.* Finally, DMH inpatient care is for inmates who "cannot be successfully treated" at a lower level of care; both intermediate and acute levels of inpatient care are to be provided. *Id.* at 12-1-9.

[25] CCCMS inmates are housed in the general prison population.

[26] At a relatively early stage in the remedial process, defendants recognized the need to develop an adequate method of forecasting the need for such beds. However, according to Robin Dezember, Chief Deputy Secretary of CDCR's Correctional

orders addressing the need for mental health care beds and treatment space, including orders directing defendants to assess the need for beds and treatment space throughout the mental health care delivery system and to plan for and develop the necessary number of beds as well as sufficient space at each level of care.[27]

When the state's growing prison population reached a record of more than 160,000 in 2006, the shortage of beds and space reached a crisis level. In March 2006, defendants were ordered to submit a plan to meet both the immediate and long-term need for mental health care beds. Mar. 3, 2006 Order at 3-4. During a subsequent hearing on the adequacy of defendants' proposed plan, the CDCR's then-Director of Health Care Services reported a shortage of 75

Healthcare Services Division at the time of trial, there was a period of several years prior to 2006 "where there seemed to be a lack of continuous attention to this program." Rep. Tr. at 862:12-14. In 2002, a health care consulting firm "designed a mental health bed demand forecast methodology for the CDCR. . . . This method projects future bed needs based on several variables that drive bed usage, including total overall prison population, length of stay and discharge rates of patients in inpatient status, and growth in outpatient demand proportional to the historical prevalence of outpatients in the total prison population." Defs.' Statewide Mental Health Bed Plan, April 2006, filed April 17, 2006, at 3. In 2006, defendants acknowledged that the forecasting methodology developed in 2002 needed to be updated. May 2, 2006 Order at 2 n.1.

[27] *E.g.*, May 21, 1998 Stip. & Order at 4; Sept. 14, 2000 Order at 2; Apr. 4, 2001 Order at 4; June 27, 2001 Order at 2; Dec. 20, 2001 Order at 1-2; Mar. 4, 2002 Order at 1; May 7, 2002 Order at 1-2; Oct. 8, 2002 Order at 2; Jan. 12, 2004 Order at 2; Apr. 5, 2004 Order at 3; July 9, 2004 Order at 3-4; Oct. 5, 2004 Order at 2; Jan. 27, 2005 Order at 2; Mar. 3, 2006 Order (*Coleman* docket # 1772) at 3-4.

MHCBs and 125 intermediate inpatient beds and "repeatedly referred to the shortage as a 'crisis.'" May 2, 2006 Order at 2. The *Coleman* court found that defendants' plan entirely failed to address the CDCR's immediate bed needs:

> The special master reports, the record reflects, and defendants admit, that the plan presented to the court in no way adequately responds to the severe shortage of intermediate care facility beds and mental health crisis beds that currently exists in the CDCR. It is undisputed that the shortage is leaving critically mentally ill inmates languishing in horrific conditions without access to immediately necessary mental health care.

Id. The court further found that defendants' long-range plan for the provision of acute and intermediate care beds and mental health crisis beds appeared "sound in principle," but required revision because it was based on population figures that were "already out of date." *Id.* Defendants' plan for EOP beds was not approved because it "describe[d] a shortfall of over 1000 such beds in the year 2011." *Id.* at 4. Following the hearing, the court ordered defendants to file an amended long-term plan and to include with that plan a list of any projects that could be accelerated; to file a plan for the interim provision of intermediate inpatient beds and mental health crisis beds; and to maintain, open, or create intermediate inpatient and mental health crisis beds at specific prison locations. *Id.* at 4-6. The *Coleman* court has subsequently issued several orders concerning the provision of EOP, MHCB, and inpatient beds, all of which are in critically short supply, including an extensive order concerning defendants' long-range and interim plans for the

provision of these beds.[28] However, providing the beds is obviously infeasible without the necessary space in which to locate them, especially in light of the constantly increasing need for such beds as a result of the substantial, if unanticipated, growth in the prison population.

b. Transfers to Appropriate Level of Care

Throughout *Coleman*'s remedial phase, the state's delivery of mental health care to its inmates has been plagued by delays in the transfer of inmates to higher levels of care. Both the original Program Guides and the Revised Program Guide include timelines for post-referral transfers to EOP programs, mental health care crisis beds, and DMH inpatient beds. *See Coleman* docket # 913 at 1-4, 4-13, 5-13, 6-4; Ex. D1148 at 12-1-16.[29] Unfortunately, the state remains

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[28] Oct. 20, 2006 Order; *see also* July 20, 2006 Order (*Coleman* docket # 1904) at 1; Aug. 23 2006 Order.

[29] The timelines in the Revised Program Guide are as follows:

Reception Centers: EOP transfers should occur within 60 days, or 30 days if clinically indicated. CCCMS transfers should occur within 90 days, or 60 days if clinically indicated.

MHCB: MHCB transfers should occur within 24 hours of referral.

DMH: Transfers to DMH acute placements should occur within 10 days of referral, if accepted to DMH. Referral must be completed within 2 working days of identification. Transfers to DMH intermediate care placements should occur within 30 days of referral, if accepted to DMH. Referral must be completed within 5-10 working days.

EOP: Transfers to general population ("GP") EOP programs should occur within 60 days, or 30 days if clinically indicated.

unable to transfer inmates to required care in a timely fashion, and the *Coleman* court has issued numerous orders directed at expediting transfers and reducing delays.[30]

c. Staffing

A final focus of the remedial effort in *Coleman* over the last decade has been the development and retention of sufficient numbers of competent mental health care clinicians. In June 1998, the *Coleman* court issued the first of numerous orders aimed at remedying the substantial understaffing of the CDCR's mental health care system, directing defendants to show improvement in the "quality and quantity of contracted psychiatric services and/or" the implementation of a "recruitment program sufficient[ ] to fill vacancies in presently authorized positions." June 16, 1998 Order at 1. In the same order, the court directed the *Coleman* Special Master to recommend the staffing ratios necessary to a constitutionally adequate mental health care delivery system. *Id.*

EOP Administrative Segregation Unit ("ASU") Hub: EOP inmates housed in the regular ASU should transfer to an EOP ASU Hub within 30 days of placement in the regular ASU or within 30 days of referral to EOP level of care.

PSU: EOP inmates housed in the ASU who are endorsed for the PSU must be transferred within 60 days of endorsement.

Stewart Expert Report ¶ 153; *see* Ex. D 1148 at 12-1-16.

[30] *E.g.*, July 26, 1999 Order at 5-6; Jan. 13, 2000 Order (*Coleman* docket # 1111) at 4; Apr. 27, 2000 Order at 5; July 3, 2000 Order at 6; Sept. 14, 2000 Order at 2; Apr. 4, 2001 Order at 3-4; Jan. 12, 2004 Order at 2; Mar. 25, 2004 Order at 2-3; Mar. 8, 2005 Order at 2; Oct. 20, 2006 Order at 3.

at 2.[31] Since then, the court has repeatedly ordered defendants to create the necessary positions and to hire staff to fill those positions.[32] In addition, the court has issued orders designed to assure the competence of staff, primarily by requiring the state to develop and implement a quality assurance and peer review process.[33]

After two years of compliance monitoring, it became apparent that orders setting staffing ratios and requiring defendants to fill clinical positions would not be sufficient to remedy the constitutional violations. Accordingly, the *Coleman* court ordered defendants to develop a plan to retain CDCR psychiatrists. July 26, 1999 Order at 4. Over the next eight years, as part of its ongoing effort to ensure that California hires and retains sufficient clinical staff, the court issued several orders concerning recruitment and retention bonuses, as well as salary increases for mental health clinicians.[34]

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[31] In July 1999, the court approved several mental health staffing ratios and required defendants to adopt and implement specific mental health care staffing ratios for administrative segregation units. July 26, 1999 Order at 4-5.

[32] *E.g.*, Aug. 25, 1998 Order at 1; Jan. 19, 1999 Order at 2; July 26, 1999 Order at 4; Jan. 13, 2000 Order (*Coleman* docket # 1111) at 4; Apr. 27, 2000 Order at 5; July 3, 2000 Order; Aug. 28, 2000 Order (*Coleman* docket # 1198) at 3; Apr. 4, 2001 Order at 4; Oct. 26, 2001 Order at 1; June 13, 2002 Order (*Coleman* docket # 1383) at 4; June 13, 2002 Order (*Coleman* docket # 1384) at 2; Mar. 3, 2006 Order (*Coleman* docket # 1772) at 3; Mar. 9, 2006 Order (*Coleman* docket # 1774) at 1-2.

[33] *E.g.*, June 16, 1998 Order at 2; Aug. 12, 1998 Order at 1-2; June 13, 2002 Order (*Coleman* docket # 1384) at 2.

[34] *E.g.*, Jan. 13, 2000 Order (*Coleman* docket # 1111) at 4-5; July 25, 2003 Order at 6; Mar. 8, 2005 Order at 1-2; June 10, 2005 Order (*Coleman* docket # 1667) at 1-2; Mar. 9, 2006 Order

3. Special Master's 2006 Monitoring Reports

By the end of the first decade of remedial work in *Coleman*, the state had made some progress but still had not met its constitutional obligation to provide *Coleman* class members with adequate mental health care. July 23, 2007 Order, 2007 WL 2122636, at *3. Worse, two monitoring reports filed by the *Coleman* Special Master in 2006 reflected a troubling reversal in the progress of the remedial efforts of the preceding decade and demonstrated the profound impact of population growth on the state's ability to meet its constitutional obligations to seriously mentally ill inmates.

On January 23, 2006, the *Coleman* Special Master filed his Fifteenth Monitoring Report, which included findings made at monitoring visits to all CDCR institutions between early August 2004 and late May 2005. Jan. 23, 2006 Fifteenth Monitoring Report at 2-3. The report was grim. The Special Master reported rising vacancy rates in staffing, as well as a "growing crisis in accessibility to a MHCB level of care and the continuing inadequacy of access to DMH programs highlighted by the unmet needs assessment that was conducted and concluded during the period." Ex. D 1108 (compilation of summaries and recommendations from the *Coleman* Special Master's twenty monitoring reports) at DEFS060221-DEFS060222. The Special Master also reported that "suicides in CDCR escalated significantly during the monitoring period for reasons that are just beginning to be subjected to analysis." *Id.* at DEFS060222.

(*Coleman* docket # 1774) at 1-2; Dec. 15, 2006 Order at 1-2; Feb. 7, 2007 Order at 2; May 23, 2007 Order (*Coleman* docket # 2236) at 5; June 28, 2007 Order (*Coleman* docket # 2301) at 3.

The Special Master further reported that "transfers to more intensive levels of mental health programming and treatment" had "deteriorated sharply and widely." *Id.* at DEFS060252. The availability of MHCBs, "the department's sole internal resource for providing short-term crisis care for unstable and suicidal inmates," had declined to the point that it "became by mid-2005 a critical issue with severe impact on CDCR's most seriously mentally disordered inmates." *Id.* In addition, "the waiting list for the admission to Psychiatric Service Units (PSUs) for EOPs with a SHU [Segregated Housing Unit] term, imposed on inmates who are viewed as a danger to themselves or others, expanded steadily, and mental health caseload inmates continued to spend long periods in reception awaiting transfer to EOP and 3CMS general population programs." *Id.* at DEFS060252-DEFS060253.

Taken together, the expanding wait lists, critical shortage of beds, and identification of hundreds of inmates in need of clinical referrals "meant that a growing number of the most seriously mentally ill inmates in the CDCR were not receiving in a timely fashion the levels of care they needed." *Id.* at DEFS060253. To explain this backward slide in the progress made under the *Coleman* court's supervision, the Special Master pointed to the prison system's expanding population. For example, "none of the [CDCR's] planning documents . . . addressed the department's need to expand its capacity to provide acute inpatient DMH care to meet the expanding need being pushed, among other causes, by an inexorably rising MHSDS population commensurate with CDCR's growing overall population." *Id.* at DEFS060258. Likewise, progress in the timely transfer of mentally ill inmates from reception centers into

general population programs had "been largely cancelled by the recently escalating growth in the overall CDCR population and the concomitantly increasing number of MHSDS inmates in reception." *Id.* at DEFS060272-DEFS060273.

Defendants did not object to the Special Master's Fifteenth Monitoring Report or the recommendations contained therein, including the Special Master's finding as to the role played by the rapidly growing prison population and the resulting lack of space necessary to provide the requisite care to mentally ill inmates. Mar. 3, 2006 Order (*Coleman* docket # 1772) at 1.

As compliance work continued in 2006, the population pressures identified by the Special Master in his Fifteenth Monitoring Report were evident: Compliance became more difficult and the gains made by defendants in the first decade receded. On December 14, 2006, the *Coleman* Special Master filed his Sixteenth Monitoring Report. That report, which covered a monitoring period from the summer of 2005 until March 2006, Ex. D 1108 at DEFS060302, revealed that serious shortages in staffing and bed space, as well as substantial delays in transfers to necessary levels of care, continued unabated.

Among other findings, the Special Master reported that "the inexorably expanding demand for services resulting from the bulging population" had caused a "continuing deterioration of mental health staffing." *Id.* at DEFS060303. According to the Special Master, "[t]welve years after the determination that mental health treatment in CDCR was unconstitutional, the defendants still lacked clinical resources to meet the needs of some 25 to 30 percent of inmates identified

as seriously mentally disordered." *Id.* at DEFS060304.

Furthermore, the Special Master reported that

> [t]he general breakdown in transfers was another transcendent issue in the 16th round of review. As the overall caseload population continued to increase, so too did the percentage of the caseload in need of program beds with intensive care and high security, including specifically DMH inpatient beds, MHCBs, PSU beds and EOP administrative segregation placements.

Id. at DEFS060306. "[A]ccess to appropriate levels of care for seriously mentally ill inmates remained a problem in almost every CDCR institution." *Id.* at DEFS060307.

Although Defendants filed a response to two recommendations contained in the Sixteenth Monitoring Report, they did not object to any of the above findings, once more including the Special Master's determination that the "escalating growth in the overall CDCR population" was a major cause of the CDCR's reversal of progress. *Id.* at DEFS060273; *see* Defs.' Dec. 7, 2006 Response to Special Master's Sixteenth Report.

C. *Crowding in California's Prison System*

1. *The Increasing California Prison Population*

Since the mid-1970s, California's prison population has increased by over 750 percent, rising from approximately 20,000 inmates to an "all-time high" in October 2006 of over 170,000 inmates, with more than 160,000 housed in the state's adult prison institutions. Ex. P1 at 1 (Governor Schwarzenegger's Oct. 4, 2006 Prison Overcrowding State of Emergency

Declaration); Ex. P5 at 62 (May 2006 California Policy Research Center Report, "Understanding California Corrections"); Fact # 9, Nov. 17, 2008 Joint Statement of Undisputed Facts; Ex. D1259-1. Much of this population expansion occurred during the time in which the *Plata* and *Coleman* courts have monitored the medical and mental health care in California's prisons. In 1991, when the *Coleman* plaintiffs filed their amended complaint, the state's prison system housed approximately 100,000 inmates. Ex. P410 at 2 (CDCR Offender Information Services Branch Data Analysis Unit, Institution and Camp Design Bed Capacity and Population, June 30, 1987-June 30, 2007). As of August 27, 2008, 156,352 inmates were housed in in-state prison institutions. Fact # 10, Nov. 17, 2008 Joint Statement of Undisputed Facts.[35]

The expansive growth of the prison population in California is due, in part, to the state's adoption of determinate sentencing in the 1970s, Ex. P5 at 61-62, and the "countless increases in criminal sentences" enacted by the legislature or in initiative measures in succeeding years, Ex. P3 at 68 (Jan. 2007 Little Hoover Commission Report, "Solving California's Corrections Crisis: Time Is Running Out") (detailing increases in California sentencing since the Determi-

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[35] In this opinion and order, we will hereafter consider only figures and percentages relating to the CDCR's thirty-three in-state adult prison institutions. We do not consider camps, community correction centers, or Department of Mental Health state hospitals, all of which also house CDCR inmates. It is the thirty-three in-state adult prison institutions that are the subject of the Governor's Prison Overcrowding State of Emergency Proclamation and were the focus of the evidence at trial before this court. All references to "system" and "systemwide" encompass only those thirty-three adult institutions.

nate Sentencing Act became effective in 1977). In addition, California's prison population has increased because of its post-sentencing practices. "The state has [ ] been widely criticized for not doing a better job of preparing inmates to return to society." Ex. P4 at 121 (June 2004 Corrections Independent Review Panel Report, "Reforming Corrections").

> Approximately 90 percent of state prison inmates are eventually released on parole, and at present, more than half return to prison. A 2003 study by the Little Hoover Commission concluded that inmates are not prepared for their release from prison. Department of Corrections reports show that 43 percent of inmates released from prison in 1999 were sent back to prison within a year and that 56 percent returned within two years. Many of those returned to prison are parolees who are sent back for violating the conditions of parole, rather than for committing new crimes, and many of those go back for relatively short periods of time—an average of 5 1/2 months.

Id. The consequences of the state's failure to prepare inmates for re-entry are significant: "The vast numbers of parolees returning to prison help drive both the size of the prison population and the cost of the system. In 2001 more than 74,000 (47 percent) of the average daily prison inmate population of 157,000 was made up of parole violators." *Id.* Finally, also significant are the actions of the parole board and the Governor in declining to release prisoners serving terms of 15 or 25 years to life who have served their minimum sentence or more with unblemished records and are determined by prison officials not to constitute a risk to society.

2. *Studies Commissioned by the State of California To Examine Prison Crowding*

The California legislature has recognized prison crowding as a serious problem since at least 1987, when it convened a Blue Ribbon Commission on Inmate Population Management. *See* Ex. P2 at 78. The commission issued its final report in 1990, with thirty-eight recommendations, including "alternative sanctions, and more programming [and] reentry programs." *Id.* Between 1990 and 2006, more than a dozen commissions and other groups issued reports with proposals to solve the overcrowding problem in California's prison system. *Id.* at 3, 10, 78-79. As Joan Petersilia, co-chair of the expert panel convened by the CDCR in 2007, noted, "all of the reports recommended essentially the same ten things," including diverting non-violent, non-serious offenders and technical parole violators from prison; using a risk and needs assessment tool to match inmates with resources and programming; expanding rehabilitative programs; reforming California's determinate sentencing system; transferring low-risk prisoners in the later part of their sentences to community-based reintegration facilities; establishing a sentencing commission; reforming parole; creating partnerships between state and local corrections agencies; requiring that all programs be based on solid research evidence; and promoting public awareness regarding California's prison system. *Id.* at 77.

One of the most exhaustive reports completed during this period was the June 2004 report of the Corrections Independent Review Panel, which was appointed by Governor Schwarzenegger; chaired by former California Governor and Attorney General George Deukmejian, who had a reputation as tough

on crime; and composed of forty independent correctional consultants and representatives from state agencies. Ex. P4 at i. The Panel noted that California's "correctional system has grown to become the largest in the nation, rivaling in size and numbers even those of most other countries," and that "[n]ot surprisingly, this massive system shows the strains of both its age and its decades-long growth." *Id.* at 199. The Panel found that "[a]dult prisons are severely overcrowded, imperiling the safety of both correctional employees and inmates." *Id.* Consequently, a number of the Panel's 237 recommendations, including the enhancement of earned credits, the expansion of rehabilitative programming, the identification of older inmates for early release, and the diversion of certain parole violators, were aimed at inmate population reduction. *See id.* at 122-61.

3. *Defining the Capacity of California Prisons*

In its report, the Corrections Independent Review Panel discussed three distinct measures of prison capacity: "design capacity," "operable capacity," and "maximum safe and reasonable capacity." Ex. P4 at 123-124. First:

> "Design capacity" is the term used for the past 50 years to designate the number of inmates a prison is designed to accommodate according to standards developed by the Commission on Accreditation and the American Correctional Association. [Footnote omitted.] The number can be based on any combination of single-occupancy cells, double-occupancy cells, single-or double-bunked multiple occupancy rooms, or dormitories. The standards take into account the need for humane conditions, as well as the need to prevent violence and move inmates to and from

> programs, such as mental health care, education classes, and drug abuse treatment.

Id. at 123. "In California, design capacity is based on one inmate per cell, single bunks in dormitories, and no beds in space not designed for housing." *Id.*

California has never limited its prison population to 100% design capacity, *id.* at 123 n.1, and has in some respects planned for inmate population levels that exceed 100% design capacity. The "staffing packages" for California's prison facilities have two parts: the "initial staffing package," which is based on population at 100% design capacity, or one inmate per cell, and the "overcrowding package which, depending on the level of the facility being built, could be 150 percent, 175 percent, 190 percent or 200 percent." Rep. Tr. at 540:24-541:4 (Raymond). The "overcrowding package" is "a staff enhancement of the design bed package." *Id.* at 548:4-7. The combined staffing package shows the size of the staff necessary for a facility at 100% design capacity and the additional staff required as the facility becomes more crowded. *Id.* at 545:10-13.

Similarly, prisons built between 1985 and 1998, when the design capacity of the CDCR's adult institutions and camps increased from 29,042 to near its present level of approximately 80,000 inmates, Ex. P212 at Table 10, "were designed and built to accommodate population growth" with respect to some infrastructure components—specifically the "'water, wastewater, electrical and mechanical components, needed to meet anticipated overcrowding of as much as 190 percent in cells and 140 percent in dormitories.'" Dezember Trial Aff. ¶ 72 (quoting Ex. D 1292, *Coleman* Special Master's May 31, 2007 Response to Court's May 17, 2007 Request

for Information, at 5). However, "these same prisons were not designed and made 'no provision' for any expansion of medical care space beyond the initial 100% of [design] capacity." *Id.* (quoting Ex. D 1292 at 4-5). "Even worse, 'none of the 19 CDCR institutions planned and built in the boom of the 80s and 90s gave any thought to the space that might be needed for mental health purposes.'" *Id.* (quoting Ex. D1292 at 5).[36] "A similar failure in design vision occurred with the Department of Mental Health," the sole provider of inpatient mental health care for CDCR inmates, "which discovered in 1998 that it had 'no facilities of its own in which to provide the level of inpatient care needed by CDCR for high custody inmates with a history of violence or escape.'" *Id.* (quoting Ex. D1292 at 8). Thus, even though the infrastructure of California's newer prisons was built to accommodate inmate populations greater than 100% design capacity, no similar accommodation was made for the provision of medical and mental health care in California's prisons.

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[36] *But see* Sept. 3, 2008 Tilton Dep. at 60:10-61:17 (testifying that in the 1980s and 1990s, the CDCR would "make sure [it] provided programs based on the population," and that this testimony referred to prisons at somewhere between 100% and 140% design capacity). We do not credit Tilton's testimony on this point because he also testified that the CDCR operated "fully-programmed facilities at that time." *Id.* at 61:16-17. As is clear from our discussion of the history of the *Plata* and *Coleman* cases, the CDCR was not operating fully-programmed facilities with regard to medical and mental health care. Moreover, even if Tilton's testimony were to be credited, he acknowledged that "certain facilities lost the ability, in terms of space, to deliver adequate programs to the inmates" when populations exceeded 140% design capacity. *Id.* at 62:14-19. As we note below, the California prison population well exceeds 140% design capacity, and indeed is approaching 200%.

The second measure of prison capacity, "operable capacity," refers to "the maximum capacity of the prisons to house inmates safely and securely while providing effective education, training, and treatment." Ex. P4 at 122. "Operable capacity . . . takes into account space needed for effective programming in addition to safety and security." *Id.* at 124. Based on input from a "group of experienced California prison wardens," the Corrections Independent Review Panel determined that the operable capacity of California's prison system is 145% design capacity. *Id.* Notably, however, operable capacity does not take into account the space required to provide medical and mental health care. *See id.* at 161 n.3; Nov. 9, 2007 Scott Report ¶ 46.

The third measure, "maximum 'safe and reasonable' capacity," refers to "the maximum number of inmates who can safely and reasonably be housed in the prison system." Ex. P4 at 124. This definition takes into account only "the 'safe and reasonable' capacity of individual housing units according to inmate custody levels, staffing levels, and the physical structure of the units." *Id.* Units for inmates at higher custody levels have a lower maximum safe and reasonable capacity than units for inmates who present a lower security risk. *Id.* at 124.

> The Department of Corrections has determined the maximum safe and reasonable capacity of the general population and reception center housing to be 190 percent of design capacity, while other housing can be filled only to between 100 and 160 percent of design capacity. Overall, the Department has determined that the maximum safe and reasonable capacity of the state's male prisons is . . . 179 percent of design capacity.

Id. "Maximum 'safe and reasonable' capacity" does not take into account "the need for humane conditions" incorporated into design capacity, or the need for programming space incorporated into both design and operable capacity. *See id.* at 123-124. More important for present purposes, that classification does not take into account the space or facilities required to provide medical or mental health care.

4. *Crowding in Relation to Capacity*

California's inmate population has far exceeded the design capacity of the state's prison system for over twenty-five years. *See, e.g.*, Ex. P268 at 2 (Institution and Camp Design Bed Capacity and Population, June 30, 1983-June 30, 2003); Ex. P410 at 2; Ex. D1259-1. By October 2006, the state's adult prisons, excluding camps, were operating at 200.2% design capacity with 162,792 inmates.[37] Ex. D1149 at 1 (CDCR weekly population report as of October 25, 2006). As of August 27, 2008, the population of these institutions was reduced to 195.9% design capacity with 156,352 inmates, largely as a result of shipping several thousand prisoners to Mississippi and other contract states. Ex. P135 at 1 (CDCR weekly population report as of August 27, 2008). The current level of crowding far exceeds even the maximum safe and reasonable capacity of the California prison system, which, by CDCR's own determination, is 179% design capacity for prisons holding male prisoners. Ex. P4 at 124.

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[37] The state also operates several prison camps, housing just over 4000 inmates. These camps are less crowded than the adult institutions and operate at between 100% and 110% design capacity. Ex. P20 at 1; Ex. P21 at 1.

D. *Governor Schwarzenegger's Emergency Proclamation*

In response to the severity of the prison crowding problem, Governor Arnold Schwarzenegger, a primary defendant in both *Plata* and *Coleman*, declared a state of emergency on October 4, 2006. Ex. P1. In his Prison Overcrowding State of Emergency Proclamation, the Governor declared that "all 33 of CDCR's prisons are now at or above maximum operational capacity, and 29 of the prisons are so overcrowded that the CDCR is required to house more than 15,000 inmates in conditions that pose substantial safety risks"; that "the severe overcrowding in 29 CDCR prisons has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them"; that "the overcrowding crisis gets worse with each passing day, creating an emergency in the California prison system"; and that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding." *Id.* at 1, 6, 8.

The risks enumerated by the Governor in his Proclamation include "increased, substantial risk for transmission of infectious illness"; security risks caused by line-of-sight problems for correctional officers, particularly in areas where inmates are triple-bunked and in "tight quarters"; and "thousands of gallons of sewage spills and environmental contamination" from overloading the prisons' sewage and wastewater systems. *Id.* at 2. Governor Schwarzenegger also declared that the suicide rate in the 29 severely overcrowded prisons "[was] approaching an average of one per week." *Id.* at 6.

In addition, the Proclamation described three separate proposals by the Governor to address the overcrowding crisis, including a proposal for "two new prisons and space for 83,000 prisoners to address California's current and future incarceration needs." *Id.* at 7. The California Legislature rejected all of these proposals. *Id.* As a result, the Governor invoked his powers under the California Emergency Services Act to call for immediate efforts to transfer inmates to out-of-state correctional facilities, as well as the suspension of state contracting laws so that the CDCR could contract for all goods and services "needed to immediately mitigate the severe overcrowding and the resulting impacts within California." *Id.* at 8-9.

The California Correctional Peace Officers' Association ("CCPOA"), a plaintiff-intervenor in this case, challenged the validity of the Proclamation in state court. On June 4, 2008, the California Court of Appeal upheld the Proclamation, finding that the Governor acted within his authority, in part because the declaration of emergency was based on conditions that presented extreme peril to the safety of persons and property. *CCPOA v. Schwarzenegger*, 163 Cal. App. 4th 802 (2008). The Proclamation declaring a state of emergency remains in effect. Fact # 12, Nov. 17, 2008 Joint Statement of Undisputed Facts.

E. *Motions To Convene Three-Judge Court and Subsequent Prison Studies by the State of California*

1. *Motions To Convene and Initial Proceedings*

Following the Governor's issuance of the State of Emergency Proclamation, the plaintiffs in *Plata* and *Coleman* filed motions to convene a three-judge court

to limit the prison population.[38] The *Plata* court continued the hearing on its motion to provide defendants with an opportunity to outline specific measures they were taking or planned to take to alleviate crowding, as well as to allow the *Plata* Receiver to analyze the effects of crowding on his remedial efforts. Feb. 15, 2007 Order in *Plata* at 4-5. Similarly, the *Coleman* court, after oral argument, continued the hearing for six months to permit defendants to demonstrate sufficient progress in their remedial efforts and in relieving prison overcrowding such that convening a three-judge court would not be necessary. Dec. 11, 2006 Rep. Tr. in *Coleman*, *passim*; Dec. 12, 2006 Order in *Coleman* at 1.

2. *Intervening Reports on Prison Crowding*

During the period in which the motions to convene a three-judge court were pending, two more reports concerning prison overcrowding were presented to the California Legislature. First, in January 2007, the Little Hoover Commission, a bipartisan and independent state body charged with conducting research and preparing recommendations to improve the economy, efficiency, and service of California state government, Cal. Gov't.Code §§ 8501, 8521-8522, echoed the concerns in the Governor's State of Emergency Proclamation, stating that "California's prisons are out of space and running out of time." Ex. P3 at 1. In its report, entitled "Solving California's Corrections Crisis: Time Is Running Out," the Com-

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[38] The Prison Litigation Reform Act of 1996 ("PLRA") provides that a prisoner release order may be issued only by a three-judge court. 18 U.S.C. § 3626(a)(3)(B). We discuss in more detail below, *infra* Section III, the meaning of the term "prisoner release order" and other relevant provisions of the PLRA.

mission, which had previously issued a series of reports on California's prisons, *id.* at 13, again offered "comprehensive recommendations" to reduce the prison population, improve public safety, and manage public dollars, *id.* at 1. Second, in June 2007, the Expert Panel on Adult Offender Recidivism Reduction Programming—a panel convened by the CDCR and consisting of the CDCR's Chief Deputy Secretary for Adult Programs and a number of academic experts, consultants, and former and current secretaries of corrections in Pennsylvania, Arizona, Washington, Ohio, and Maine,[39] Ex. P2 at ii—issued a report recommending a course of action to reduce the prison population while at the same time reducing recidivism and generating savings. Ex. P2.

The first recommendation of both the Little Hoover Commission and the CDCR Expert Panel was to reduce prison overcrowding. Ex. P3 at iv; Ex. P2 at 10. Both panels noted that the state had received numerous reports over the past two decades containing recommendations for reducing the state's prison population. Ex. P3 at iv; Ex. P2 at 10 & App. A. Although the Expert Panel was convened to make recommendations for reducing California's high recidivism rate and "improving the programming in California's prison and parole system," Ex. P2 at vii, and not for "solving the overcrowding problem," *id.* at 10, the panel nonetheless found that California's

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[39] Several members of the Expert Panel appointed by defendants, including James Austin, Ph.D., Jeffrey Beard, Ph.D., Joseph Lehman, and Barry Krisberg, Ph.D., testified for plaintiffs at the trial of this matter. Another member of the Expert Panel, James Gomez, was the Director of the California Department of Corrections from 1991 to 1996, during the merits phase of the *Coleman* action.

prisons were "dangerously overcrowded" and that reducing overcrowding was a "'pre-condition' to [the] success" of its mission, *id.* at viii.

3. *Final Hearing and Rulings*

On June 27, 2007, the *Plata* and *Coleman* courts jointly heard oral argument on plaintiffs' motions to convene a three-judge court. Persuaded that the state had not adequately addressed its prison overcrowding crisis so as to make possible the remedying of the constitutional violations, and that consideration of a population reduction order was necessary in order to achieve that objective in both cases, both courts granted plaintiffs' motions. July 23, 2007 Order in *Plata*, 2007 WL 2122657; July 23, 2007 Order in *Coleman*, 2007 WL 2122636.

The *Plata* court found that although "the Receiver has made much progress since his appointment," the establishment of the *Plata* Receivership did not require the court "to wait more time, potentially years, to see whether the Receiver's plans will succeed or fail." July 23, 2007 Order in *Plata*, 2007 WL 2122657, at *3. It found that the unconstitutional conditions that led to the Receiver's appointment continued to exist. The *Plata* court explained:

> Had the Receiver reported to the Court that he did not view overcrowding to be a substantial impediment to implementing the reforms required in this case, the Court may well have reached a different conclusion regarding the appropriateness of convening a three-judge court to consider a prisoner release order. However, quite to the contrary, the Receiver's reports indicate that overcrowding is a serious problem that impacts, for example, his ability to develop

adequate reception centers and health facilities because of the high numbers of inmate transfers and the inadequate amount of available health care beds and other physical space. Receiver's Report Re: Overcrowding [Ex. D1092] at 26-28. Overcrowding also negatively impacts the Receiver's ability to hire and retain competent medical and managerial staff. *Id.* at 24-26. Beyond that, the Receiver reports that:

> Every element of the Plan of Action faces crowding related obstacles. Furthermore, overcrowding does not only adversely impact the Receiver's substantive plans, it also adversely impacts on the very process of implementing remedies because overcrowding, and the resulting day to day operational chaos of the CDCR, creates regular "crisis" situations which call for action on the part of the Receivership and take time, energy, and person power away from important remedial programs.

Id. at 28-29. . . .

Tellingly, the Receiver's concerns about the impacts of overcrowding on his ability to reform the medical health care delivery system became even stronger in the weeks following his initial report. In his supplemental report, filed just four weeks after his initial report, the Receiver concluded that: "Mission changes, yard flips, and prison-to-prison transfers, aggravated by the limited alternatives imposed by overcrowding, are now assuming a size, scope and frequency that will *clearly* extend the timeframes and costs of the receivership and *may render adequate medical care impossible*, especially for patients

> who require longer term chronic care." Receiver's Sup 1. Report Re: Overcrowding [Ex. D1094] at 10 (emphases added). While the Court appreciates Defendants' statements that greater coordination between the State and the Receiver will alleviate some of the Receiver's concerns, such sentiments only underscore the Receiver's expressed concerns that overcrowding presents serious problems not only because of the substantive ways in which it interferes with delivery of medical care, but also because of the amount of time and attention the Receiver must devote to dealing with crowding-related issues. *It is clear to the Court that the crowded conditions of California's prisons, which are now packed well beyond their intended capacity, are having—and in the absence of any intervening remedial action, will continue to have—a serious impact on the Receiver's ability to complete the job for which he was appointed: namely, to eliminate the unconstitutional conditions surrounding delivery of inmate medical health care.*

Id. at *4 (last emphasis added).

The *Coleman* court found that between 1997 and 2005, defendants had made "slow but evident progress toward constitutional compliance," but that, "[i]n spite of the commendable progress . . . , defendants' mental health care delivery system has not come into compliance with the Eighth Amendment at any point since this action began." July 23, 2007 Order in *Coleman*, 2007 WL 2122636, at *3. The *Coleman* court further found that:

> Several prisons remain notable exceptions to the progress made at others, and delays in access to care at the highest level of need—mental health

crisis beds, acute inpatient care, and intermediate inpatient care—have plagued the CDCR throughout the course of this litigation. Moreover, defendants' efforts at long-range planning for the delivery of mental health care continues to be hampered by inadequacies in the capture and collection of data and the use of outdated methodologies to interpret that data.

. . . [O]n May 31, 2007, the Special Master reported that programming space, beds for mentally ill inmates, and staffing levels have all been "impacted seriously by overcrowding." Special Master's Response to Court's May 17, 2007 Request for Information, filed May 31, 2007, at 4-14 ("Special Master's May 31, 2007 Response"). The staffing shortages alone mean that the CDCR only has enough staff "to provide full mental health services to roughly two-thirds of its mental health caseload, or two-thirds of required services to its full caseload, or, probably more realistically, some combination of reduced services to some segments of the caseload that can be covered with a third less clinicians than required." *Id.* at 11-12. While acknowledging the difficulties in quantifying precisely the scope of the unmet mental health needs, the Special Master reports that,

> defendants cannot meet at least a substantial portion, amounting in some loose amalgam to about 33 percent, of acknowledged mental health needs with current staffing resources. Insufficient intensive mental health treatment beds and a chronic lack of programming space for mental health treatment contribute further to defendants' inability to meet required men-

> tal health services. All three deficiencies are unquestionably exacerbated by overcrowding.
>
> *Id.* at 14. With a mental health caseload of almost 33,000 inmates, *id.* at 2, this level of unmet needs is unconscionable.

Id. at *3-*4 (footnote omitted).

In their orders granting plaintiffs' motions, the *Plata* and *Coleman* courts recommended that the cases be assigned to the same three-judge court "[f]or purposes of judicial economy and avoiding the risk of inconsistent judgments." July 23, 2007 Order in *Plata*, 2007 WL 2122657, at *6; *see also* July 23, 2007 Order in *Coleman*, 2007 WL 2122636, at *8. The Chief Judge of the United States Court of Appeals for the Ninth Circuit agreed and, on July 26, 2007, convened the instant three-judge district court pursuant to 28 U.S.C. § 2284.

F. *Proceedings Before this Three-Judge Court*

In August and September 2007, this court granted motions to intervene on behalf of defendants filed by groups of district attorneys; sheriffs, police chiefs, and probation officers (collectively "law enforcement intervenors"); counties; and Republican state Senators and Republican Assembly Members. We note that the Republican state Senators and Republican Assembly Members constitute just over a third of the membership of each respective body. We also granted the CCPOA's motion to intervene on behalf of plaintiffs.

On November 1, 2007, we appointed a settlement referee, former state Court of Appeal Justice Elwood Lui, and a settlement consultant, current state Court of Appeal Justice and former Legal Affairs Secretary

to Governor Schwarzenegger, Peter Siggins, to aid the parties and intervenors in settlement discussions. Nov. 1, 2007 Order at 1-2. However, the settlement efforts ultimately proved unsuccessful, as Justices Lui and Siggins reported to the three-judge court on June 25, 2008.

On September 15, 2008, defendants filed a motion for summary judgment, which we denied by written order on November 3, 2008. Trial commenced on November 18, 2008, and concluded on December 19, 2008, after fourteen court days in which we heard testimony from nearly fifty witnesses, received written testimony from several additional witnesses, and received hundreds of exhibits into evidence. Following the close of evidence, we received proposed findings of fact and conclusions of law from the parties and intervenors and heard final argument on February 3 and 4, 2009.

To assist the parties in planning their further actions, we issued a tentative ruling on February 9, 2009, explaining that plaintiffs had met their burden of proof and that a population reduction order was necessary to remedy the constitutional violations concerning the provision of medical and mental health care in California's prisons. We even gave the state an indication of the range within which the population cap would fall. In our tentative ruling, we once again asked whether a court-appointed settlement referee would be of assistance. Plaintiffs and intervenors expressed a willingness to engage in further settlement discussions, but the state defendants responded that they did not believe such efforts would be fruitful.

After carefully reviewing all of the evidence and oral and written arguments presented in this

proceeding, we make the following findings of fact and conclusions of law and issue the following order. This opinion and order supersedes the tentative ruling in its entirety.

III. LEGAL FRAMEWORK

Federal courts have long recognized that population reduction orders may sometimes be necessary to ensure constitutional prison conditions. For example, in *Duran v. Elrod*, 713 F.2d 292 (7th Cir.1983), the Seventh Circuit upheld a district court's order requiring a reduction in the population of the Cook County Department of Corrections, finding that the order was "sensitive to [ ] . . . the principles of federalism," *id.* at 297, and that the district court "acted fairly and reasonably to ease a critical problem" of overcrowding in the face of "substantial noncompliance" by Cook County, *id.* at 298. Likewise, in *Newman v. Alabama*, 683 F.2d 1312 (11th Cir.1982), the Eleventh Circuit found that, where Alabama's county jails were unconstitutionally overcrowded, a cap on the state inmate population in the county jails "represent[ed] the proper balance between the duty of the district court to remedy constitutional violations and the right of the State to administer its prison and parole systems," *id.* at 1321. There are other examples as well, including a continuing cap on Los Angeles County's jail population stipulated to by the parties in *Rutherford v. Pitchess*, No. CV 75-4111 (C.D.Cal.).

Until 1996, federal courts relied upon general principles of equitable relief and federalism in deciding whether to enter a population reduction order to remedy constitutional violations. However, in 1996 Congress enacted the Prison Litigation Reform Act ("PLRA"), Pub.L. No. 104-134, 110 Stat.

1321 (codified in relevant part at 18 U.S.C. § 3626). The PLRA established "a comprehensive set of [statutory] standards to govern prospective relief in prison conditions cases." *Gilmore v. California*, 220 F.3d 987, 998 (9th Cir.2000). Because there is no dispute that both the *Plata* and *Coleman* lawsuits are "civil action[s] with respect to prison conditions," the matter before us is governed by the statutory requirements of the PLRA. 18 U.S.C. § 3626(a)(1).

The PLRA contains two sets of requirements that are relevant here: one applicable to all forms of "prospective relief" in federal prison conditions lawsuits, *see id.*, and another applicable only to "prisoner release orders," *see id.* § 3626(a)(3). The PLRA defines a "prisoner release order" as "any order . . . that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." *Id.* § 3626(g)(4). Under this definition, a "prisoner release order" includes not only an order requiring the release of presently incarcerated inmates, but also an order requiring the diversion of convicted persons from prison, changing the treatment of parole violators in order to prevent their return to overcrowded prisons, or imposing a cap on the prison population or any part of it. *See, e.g.*, *Tyler v. Murphy*, 135 F.3d 594, 595-96 (8th Cir. 1998) (finding a cap on the number of technical probation violators who could be admitted to a particular facility to be a "prisoner release order"). There is no dispute that the population reduction order requested by the plaintiffs falls within the PLRA's definition of "prisoner release order" because the order would have the "purpose" of "limiting the prison population." 18 U.S.C. § 3626(g)(4). Accordingly, this court can grant the plaintiffs' request for a population reduction

order only if the proposed order meets both the PLRA's specific standard for prisoner release orders and its general standard for prospective relief in prison conditions cases.

A. *The PLRA Standard for Prisoner Release Orders: Primary Cause and No Other Relief*

The PLRA does not prohibit courts from entering an order requiring a reduction in the population of a prison or prison system. To the contrary, in enacting the PLRA, Congress was clear to state that "a court still retains the power to order [a population reduction order]" when such an order "is truly necessary to prevent an actual violation of a prisoner's federal rights." H.R. Rep. No. 104-21, at 25 (1995); *cf.* 141 Cong. Rec. S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham) (noting that the PLRA permits "narrowly tailored order[s] to correct" constitutional violations and that the PLRA "allows the courts to step in where they are needed").[40] Rather than barring "prisoner release orders" altogether, the PLRA simply makes such orders, including population caps and other population reduction orders, "the remedy of last resort." H.R. Rep. No. 104-21, at 25.

It does so by imposing a number of restrictions on the entry of prisoner release orders. First, a court considering such an order must find that "a court has previously entered an order for less intrusive relief

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[40] In fact, a number of courts have entered consent decrees for prisoner release since the enactment of the PLRA—decrees that must meet the same set of requirements as any order entered by a court. *See* 18 U.S.C. § 3626(c)(1); *Roberts v. Mahoning County*, 495 F.Supp.2d 719 (N.D. Ohio 2007); John Boston, *The Prison Litigation Reform Act*, 67 Brook. L.Rev. 429, 446 n.67 (2001) (collecting orders for overcrowding relief entered by consent decree after the enactment of the PLRA).

that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order," and that "the defendant has had a reasonable amount of time to comply with the previous court orders." 18 U.S.C. § 3626(a)(3)(A). If both of these requirements are met, the court must request that a three-judge district court be convened to consider the propriety of the proposed order. *Id.* § 3626(a)(3)(B). Finally, the three-judge court must find by clear and convincing evidence (1) that "crowding is the primary cause of the violation of the Federal right," and (2) that "no other relief will remedy the violation of the Federal right." *Id.* § 3626(a)(3)(E).

Before convening the present three-judge court, the *Plata* and *Coleman* courts found that their prior orders for less intrusive relief had failed to remedy the unconstitutional denial of adequate medical and mental health care to prisoners in California's prisons, and that the defendants have had a more than reasonable amount of time to comply with those prior orders. *See* July 23, 2007 Order in *Plata*, 2007 WL 2122657, at *3; July 23, 2007 Order in *Coleman*, 2007 WL 2122636, at *2. Accordingly, the findings required by § 3626(a)(3)(A) have been made. The procedural history described above clearly establishes that the *Plata* and *Coleman* courts have previously entered orders for less intrusive relief that have failed to remedy the constitutional deprivations at issue in each case despite the reasonable time given to defendants to comply with those orders. In this opinion and order, we primarily consider the requirements of § 3626(a)(3)(E)—whether crowding is the "primary cause" of the unconstitutional denial of adequate medical and mental health care to California's prisoners, *see infra* Section IV, and whether any

other form of relief could remedy those constitutional violations, *see infra* Section V.

B. *The PLRA Standard for All Prospective Relief: Need-Narrowness-Intrusiveness and Consideration of Public Safety*

In addition to these specific limitations on the entrance of prisoner release orders, the PLRA establishes a standard applicable to all forms of prospective relief in prison conditions lawsuits. First, the PLRA requires that such relief "[be] narrowly drawn, extend[ ] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). Rather than imposing any new limitations on federal authority, this provision codifies the common-law standard for injunctive relief, generally referred to as the "need-narrowness-intrusiveness" standard. *See* H.R. Rep. 104-21, at 24 n.2 (1995) (explaining that the "dictates of [18 U.S.C. § 3626(a)(1)] are not a departure from current jurisprudence concerning injunctive relief"); *see also Armstrong v. Davis*, 275 F.3d 849, 872 (9th Cir.2001); *Smith v. Ark. Dep't of Corr.*, 103 F.3d 637, 647 (8th Cir.1996); *Williams v. Edwards*, 87 F.3d 126, 133 n. 21 (5th Cir.1996).[41] Likewise, the PLRA requires that any prospective relief "extend no further than necessary to correct the

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[41] In lieu of changing the general standard for prospective relief in prison conditions cases, the PLRA limits federal court authority in matters relating to prison conditions primarily by applying the "need-narrowness-intrusiveness" standard to consent decrees as well as court orders, 18 U.S.C. § 3626(c)(1); by making it easier to terminate existing court orders or consent decrees, 18 U.S.C. § 3626(b); and by imposing distinct limitations on prisoner release orders, 18 U.S.C. § 3626(a)(3).

violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A); *cf. Lewis v. Casey*, 518 U.S. 343, 357-360 (1996) (holding that the remedy in a prison conditions case must remedy actual injuries that have been identified by the court and suffered by the plaintiffs). In class action lawsuits such as *Plata* and *Coleman*, the PLRA requires that the remedy be tailored to the actual injuries suffered by class members. *See Armstrong*, 275 F.3d at 870-73.

Second, the PLRA requires that any court considering the entry of prospective relief give "substantial weight" to any adverse impact the order might have on public safety or the operation of the criminal justice system. 18 U.S.C. § 3626(a)(1)(A); *see also* H.R. Rep. No. 104-21, at 24 (1995) (stating that courts must give "appropriate consideration" to "any potential impact on public safety or the criminal justice system"). This requirement codifies the longstanding common law requirement that federal courts "pay particular regard for [ ] public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *see also Yakus v. United States*, 321 U.S. 414, 440 (1944).

We address the "need-narrowness-intrusiveness" standard in Section VI and consider the impact of the order we adopt on public safety and the operation of the criminal justice system in Section VII.

C. *The Remedial Nature of the Three-Judge Court Proceeding*

The question before this three-judge court is whether the remedy requested by the plaintiffs is proper as a matter of federal law. The *Plata* and

Coleman courts years ago identified the constitutional deficiencies underlying this proceeding. Since that time, both cases have been in their remedial phase. After prior remedial efforts failed, the *Plata* and *Coleman* courts both faced the question whether an order requiring a reduction in the population of California's prisons was necessary to remedy the previously identified constitutional violations, and both concluded that such an order should be considered by a three-judge court.

We need not yet again evaluate the state's continuing constitutional violations. In requesting that this three-judge court be convened, the *Plata* and *Coleman* courts both found, without objection from defendants, that the constitutional violations were ongoing. *See* July 23, 2007 Order in *Plata*, 2007 WL 2122657, at *3; July 23, 2007 Order in *Coleman*, 2007 WL 2122636, at *4. That is sufficient under the PLRA. In addition, defendants have never filed a motion to terminate under § 3626(b), the proper means for any challenge to the existence of "current and ongoing" constitutional violations relating to the provision of medical and mental health care in the California prisons. Moreover, even if we were required to find independently that the requirements of § 3626(a)(3)(A)—including its requirement that prior orders have "failed to remedy the deprivation of the Federal right"—have been met, we did so in denying defendants' motion for summary judgment, Nov. 3, 2008 Order at 6-7. Accordingly, the question we must answer in this opinion and order is entirely remedial, *i.e.*, whether the plaintiffs' proposed

remedy meets the imposing standards established by the PLRA.[42]

IV. CROWDING AS PRIMARY CAUSE

The extent of overcrowding in the California prison system, approximately 190% of systemwide design capacity, is "extraordinary" and "almost unheard of." Rep. Tr. at 297:1-17, 298:19-20 (Haney). The problem is "widespread" and "not restricted to just a few institutions. It's occurred throughout the system." *Id.* at 297:23-25. There would seem to be no dispute about the egregious nature of the overcrowding in this case. Under the PLRA, however, the question is whether clear and convincing evidence establishes that the overcrowding is the primary cause of the unconstitutional denial of adequate medical and mental health care to California's prisoners. 18 U.S.C. § 3626(a)(3)(E)(i). Only if it is may the court—a three-judge court—enter a population reduction order. Defendants do not contest that prison crowding impedes the delivery of constitutionally adequate medical and mental health care in the California prison system. They claim only that crowding is not the *primary* cause of the violations of plaintiffs' constitutional rights. *E.g.*, Rep. Tr. at 2953:6-11 (closing argument by defendants' counsel).

We accept defendants' proposed definition of "primary cause" as the cause that is "first or highest in rank or importance; chief; principal." *Random House Webster's Unabridged Dictionary* 1537 (2d

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[42] Because this proceeding deals only with the plaintiffs' requested remedy, we did not permit the introduction of evidence relevant only to determining whether the constitutional violations found by the *Plata* and *Coleman* courts were "current and ongoing."

ed.1998) (defining "primary").[43] We note, however, that the PLRA does not require that crowding be the *only* cause of the constitutional violations at issue. "Probably it cannot be said of any event that it has a single causal antecedent; usually there are many." 4 Harper, James and Gray on Torts § 20.2 (3d ed.2007). The PLRA's "primary cause" standard incorporates this basic aspect of causation. By requiring only that crowding be the *primary* cause of the constitutional violations at issue, the PLRA's language explicitly contemplates that *secondary* causes may exist. Had Congress intended to require that crowding be the only cause, it would have used language to that effect—for example, "exclusive" or "only" instead of "primary."

As all of the parties to this proceeding have recognized, in the context of prison conditions litigation "crowding" refers to the presence in a facility or prison system of a prisoner population exceeding that facility or system's capacity. *See, e.g., Doty v. County of Lassen*, 37 F.3d 540, 543 (9th Cir.1994) (finding overcrowding where a jail's actual population exceeded its design capacity by an average of approximately fifty percent); *Hoptowit v. Ray*, 682 F.2d 1237, 1248-49 (9th Cir.1982) (finding a penitentiary overcrowded where its population exceeded its design capacity); *see also Lareau v. Manson*, 651 F.2d 96, 99-100 (2d Cir.1981); *cf. Random House Webster's Unabridged Dictionary* 482 (2d ed.1998) (defining "crowded" as "filled to excess"). In other contexts, the term "overcrowding" would ordinarily be used. Here,

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[43] Unfortunately, the legislative history of the PLRA is sparse and provides no meaningful insight into the meaning of "primary cause" or "crowding."

the words crowding and overcrowding have the same meaning, and we use them interchangeably.

A prison system's capacity is not defined by square footage alone; it is also determined by the system's resources and its ability to provide inmates with essential services such as food, air, and temperature and noise control. Following the parties' lead, we will discuss the capacity of the California prison system primarily in terms of design capacity. As the Corrections Independent Review Panel explained, design capacity "designate[s] the number of inmates a prison is designed to accommodate according to standards developed by the Commission on Accreditation and the American Correctional Association." Ex. P4 at 123. These standards "take into account the need for humane conditions, as well as the need to prevent violence and move inmates to and from programs, such as mental health care, education classes, and drug abuse treatment." *Id.*

Taking into account the meaning of "primary cause" and the criteria governing "crowding," we must determine whether the presence in California's prison system of a prison population almost double the system's design capacity is the principal cause of the failure to provide constitutionally adequate medical and mental health care to the members of the *Plata* and *Coleman* classes.

As we discuss below, the evidence presented at trial, including testimony from defendants' experts, admissions by defendants and their agents, and data maintained by defendants, overwhelmingly establishes not only that crowding adversely affects every aspect of prison administration, forcing a constant state of crisis management, but also that crowding creates numerous barriers to the provision of medical

and mental health care that result in the constitutional violations we consider here. These barriers include severe space and other shortages that prevent inmates from receiving the care they require. Crowding also renders the state incapable of maintaining an adequate staff and an adequate medical records system. In addition, crowding causes prisons to rely on lockdowns, which further restrict inmates' access to care, and it forces prisons to house inmates in non-traditional settings, such as triple-bunks in gyms and dayrooms not designed for housing, that contribute to the lack of care and the spread of infectious disease and that increase the incidence and severity of mental illness among prisoners.

Multiple experts testified that crowding is the primary cause of the constitutional violations at issue in *Plata* and *Coleman*. Most impressive, four current or former prison administrators so testified. These four correctional experts had, collectively, administered the correctional systems of five different states, including California.[44] Three had never before testified on behalf of a prisoner, and two were not paid for their time as experts. A number of medical and mental health experts also testified that crowding is the primary cause of the constitutional violations, and even defendants' own mental health expert testified that crowding is the primary cause of

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[44] The experts included Jeanne Woodford, former warden at San Quentin and former acting Secretary of the CDCR; Doyle Wayne Scott, former Executive Director of the Texas Department of Criminal Justice; Joseph Lehman, former head of corrections in Pennsylvania, Washington, and Maine; and Jeffrey Beard, current Secretary of the Pennsylvania Department of Corrections.

defendants' inability to provide adequate care to the *Coleman* class at reception centers. Dec. 10, 2007 Packer Report at 20. As the Secretary of the Pennsylvania Department of Corrections testified, "the biggest inhibiting factor right now in California being able to deliver appropriate mental health and medical care is the severe overcrowding of [the] system." Rep. Tr. at 219:7-10 (Beard). We agree. For the reasons we discuss below, we conclude that clear and convincing evidence establishes that crowding is the primary cause of the unconstitutional denial of medical and mental health care to California's prisoners.

A. *General Problems in the Delivery of Medical and Mental Health Care Caused by Crowding*

Correctional experts agree that crowding "affects virtually every aspect of a prison's operation." Aug. 15, 2008 Lehman Report ¶ 10 (expert report from former head of corrections in Pennsylvania, Washington, and Maine). Jeanne Woodford, the former head of corrections in California, testified that, under crowded conditions, there "are simply too many issues that arise from such a large number of prisoners and staff. One result of this is that management spends virtually all of its time fighting fires instead of engaging in thoughtful decision-making and planning. This results in short-sighted decisions that create even more crises." Nov. 9, 2007 Woodford Report ¶ 12. Doyle Wayne Scott, a thirty-year employee of the Texas Department of Criminal Justice who served as its Executive Director for five years, explained:

> Overcrowding has burdened CDCR's inadequate management systems that underlie health care delivery. The excessive population leads to

> management failures in two ways. First, overcrowding engenders a state of perpetual crisis that causes management failures. Administrators spend their time doing damage control, rather than making sure the prison is operating properly and prisoners are getting the services that they need . . . . A population of 7,000 or more, as is found in some California prisons, is not manageable at all. The sheer size and complexities of managing a prison that size would be overwhelming for one manager especially with the limited resources in the areas of staffing and inadequate space for services to the offenders that I observed at all of the prisons I toured in California. One warden simply cannot know what he/she needs to know on a daily basis to make good informed management decisions.
>
> Second, overcrowding overwhelms management infrastructure. As I have read in numerous reports of the Receiver, the CDCR lacks the management information systems needed to adequately organize and track prisoner transfers for specialized medical and mental health care and public health related needs (for example, people with compromised immune systems not going to Valley Fever risk areas) in the severely overcrowded conditions.

Nov. 9, 2007 Scott Report ¶¶ 1, 76-77. Secretary Woodford concluded that crowding makes it "virtually impossible for the organization to develop, much less implement, a plan to provide prisoners with adequate care"; "[i]n [her] opinion, it is all but impossible to safely and humanely incarcerate this many prisoners within the existing facilities." Nov. 9, 2007 Woodford Report ¶¶ 10, 12.

As put in the most simple terms by Secretary Woodford, who recently administered the California prison system and who shortly before that was the warden at San Quentin, "[o]vercrowding in the CDCR is extreme, its effects are pervasive and it is preventing the Department from providing adequate mental and medical health care to prisoners." Aug. 15, 2008 Woodford Supp. Report ¶ 31. While defendants dispute that crowding is the primary cause of the ongoing constitutional violations in *Plata* and *Coleman*, they do not dispute that crowding makes the delivery of adequate medical and mental health care in the California prison system extremely difficult. Matthew Cate, the current head of the CDCR and a defendant in this proceeding, stated that "overpopulation makes everything we do more difficult," Rep. Tr. at 1683:19-20, and further agreed that crowding continues to "severely hamper[ ]" the Department's ability "to provide inmates with adequate medical care in a fiscally sound manner," *id.* at 1683:3-19 (testimony that statements in the Office of the Inspector General's 2006 audit of the CDCR, issued when Cate was the Inspector General, continue to be true today); Ex. P46 at ES-1 (April 2006 Office of the Inspector General Accountability Audit, Review of Audits of the California Department of Corrections and Rehabilitation Adult Operations and Adult Programs, 2000-2004). James Tilton, Cate's predecessor as Secretary of the CDCR, likewise explained that it "was clear" to him that crowding, and the resulting lack of space, adversely affected the delivery of medical and mental health care. Sept. 3, 2008 Tilton Dep. at 80:5-25. Similarly, John Dovey, a former CDCR official, testified before a state Senate committee in August 2006 that "the risk of catastrophic failure in a system strained from

severe overcrowding is a constant threat. As the Director of the Division of Adult Institutions [for the CDCR], it is my professional opinion this level of overcrowding is unsafe and we are operating on borrowed time." Ex. P72 at 15 (Aug. 15, 2006 CDCR Presentation to Senate Select Committee on Prison Population Management and Capacity). Before this court, Robin Dezember, then the Chief Deputy Secretary of the Correctional Healthcare Services Division of the CDCR, stated his "belief that we are terribly overcrowded in our prison system," and that crowding adversely affects the delivery of mental health care services. Rep. Tr. at 853:13-15, 21-24. Even defendants' expert Dr. Ira Packer opined that "the overcrowding in CDCR significantly contributes to the difficulties in providing adequate mental health services." Dec. 10, 2007 Packer Report at 8.

B. *Space Issues Affecting the Delivery of Care*

The evidence before us demonstrates that crowding causes a number of specific problems central to the ongoing violation of California inmates' constitutional right to adequate medical and mental health care. One of the clearest effects of crowding is that the current prison system lacks the physical space necessary to deliver minimally adequate care to inmates. This manifests itself in a variety of areas, each of which we discuss below.

1. *Reception Centers*

The medical and mental-health related problems caused by crowding are immediately apparent at the state's reception centers. Each year, California admits approximately 140,000 inmates into the state prison system. Rep. Tr. at 224:17-18 (Beard); *see also* Aug. 15, 2008 Austin Report ¶¶ 45-46 & Table 3; Ex.

P18 at 3; Ex. P19 at 2; Ex. P75 at 3.[45] The CDCR's reception centers are the locus of the intake and classification functions for all of these inmates. *See* Nov. 9, 2007 Austin Report ¶¶ 27-28; Aug. 15, 2008 Austin Report ¶ 97. The CDCR has reception centers at twelve prisons, nine at male institutions and one at each of the state's three female prison institutions. Ex. P135 at 3-4. As of August 2008, all but one of these reception centers were near or over 200% design capacity, and two were over 300% design capacity. *Id.* This severe crowding at the reception centers makes it impossible to provide adequate medical and mental health services to inmates entering the California prison system. In addition, severe crowding throughout the system forces prisons to house inmates in these reception centers without adequate care for extended periods of time.

As the *Plata* Receiver explained, reception centers "must be staffed and have the appropriate clinical space to provide a level of medical care and clinical evaluations above that of the general population institutions." Ex. D1092 at 19 (*Plata* Receiver's May 15, 2007 Report Re: Overcrowding).[46] Each time an individual is admitted to the CDCR, whether for the first time, by re-offending, or on a parole violation:

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[45] As Dr. Austin explained, "[t]here are two major types of prison admissions for the CDCR—new court commitments and parole violators." Aug. 15, 2008 Austin Report ¶ 45. At the cited pages, Exhibits P18, P19, and P75 set forth data on new admissions, felon parole violators returned with a new term, and felon parole violators returned to custody during periods specified in each exhibit. The aggregation of these three numbers in each of the exhibits ranges from 141,288 (Ex. P18) to 139,399 (Ex. P19) to 140,560 (Ex. P75).

[46] Plaintiffs also offered this document into evidence as Exhibit P26.

> he or she returns to the CDCR through a reception center where a medical/mental health/dental health care appraisal must be performed. Once that appraisal is completed the newly received prisoner is transferred to an open bed at a prison which has been designated for his or her classification. However, none of the CDCR's designated reception centers were designed or constructed with adequate clinical space [to perform these functions].

Id.; *see also, e.g.*, Aug. 15, 2008 Haney Report ¶¶ 246-247 (describing space shortages at the California Correctional Institution reception center, including a holding room containing three holding cells that "were originally intended to hold disciplinary cases but now have been converted to mental health use"). "To make matters worse, as the original prisons designated for reception became overwhelmed by the influx of parole violators, the CDCR was forced to 'convert' general population prisons into reception centers. These 'conversions,' however, were not accompanied by adequate additions to clinical staff or clinical space." Ex. D1092 at 19; *see also, e.g.*, Nov. 9, 2007 Stewart Report ¶ 48 (because reception center at DVI "was not designed as a reception center, it has been difficult to find space for various reception center functions").

Without sufficient space, reception centers are unable to screen or treat inmates adequately. For instance, as plaintiffs' medical expert Dr. Ronald Shansky explained, the number of prisoners who must be processed at the reception center at CIM "exceeds the number of patients that can be adequately treated," thereby forcing the prison to "squeeze[ ] too many prisoners and too many provid-

ers into the available treatment area." Nov. 9, 2007 Shansky Report ¶ 12. Exams are conducted in areas separated only by "a thin white fabric folding screen that is approximately five to six feet tall" and conversations between physicians and inmates can be overheard on the other side of the screen. *Id.* Similarly, at North Kern State Prison, inmate health interviews are conducted in a small office, "with prisoners sitting back to back, separated only by a shoulder-high divider." Sept. 10, 2008 Shansky 2d Supp. Report ¶ 23. Such conditions do not allow for appropriate confidentiality, causing prisoners to be "less likely to provide accurate information about sensitive medical and psychiatric conditions." *Id.* ¶ 24; *see also* Aug. 15, 2008 Haney Report ¶ 280 (psychiatrist and psychologist who work in the North Kern reception center "must share a converted cell that serves as their office"); Nov. 9, 2007 Stewart Report ¶ 48 (describing observations of small classroom at DVI reception center "where at any time six psychologists simultaneously conduct reception center mental health assessments for new arrivals"); *id.* ¶ 82 (noting that the "[l]ack of adequate and appropriate space for reception center psychological screening was also apparent at DVI").

Moreover, at North Kern, follow-up physical examinations are conducted in rooms that "are so small that it would be very difficult if not impossible to perform an actual physical examination in them," so that the "'exams' that take place are in fact simply medical interviews, primarily for the purpose of determining what type of housing is appropriate for the prisoner." Sept. 10, 2008 Shansky 2d Supp. Report ¶ 25. This violates the "basic principle that incoming prisoners must undergo a comprehensive exam upon arrival so that an adequate treatment

plan may be developed and implemented. A physical exam, as opposed to a medical interview, is necessary because some conditions can be identified and confirmed only through physical examination of the patient." *Id.* ¶ 26; *see also* Rep. Tr. at 224:10-225:15 (Beard) (testifying that the number of people coming in through reception centers may cause prisons to "miss people who have certain needs and certain care needs that aren't being dealt with"). The medical facilities at North Kern are also so "inadequate" that defendants cannot comply with the *Plata* policies and procedures they agreed to implement, which provide for a complete history and physical examination of inmates within fourteen days of arrival at a reception center. Sept. 10, 2008 Shansky 2d Supp. Report ¶ 22.

The consequences of the state's inability to screen inmates properly at the reception centers are obvious: If an inmate's health needs are not identified, they cannot be treated. In addition, inmates whose needs are not identified may be placed in a setting that will exacerbate existing but unidentified health problems. Likewise, if the lack of confidentiality in the screening centers prevents inmates from reporting infectious diseases, the failure to diagnose them at the reception center may result in their being spread throughout the prison population.

In addition to preventing the reception centers from properly screening newly admitted inmates, crowding at the reception centers prevents the provision of adequate care to the inmates housed there. As numerous experts, including defendants' own mental health expert, testified, the number and types of inmates in the centers overwhelms their capacity to provide adequate medical or mental health care services. Rep. Tr. at 1121:16-19 (Packer); Rep. Tr. at

368:12-369:4 (Woodford) (mentally ill inmates did not receive "really any treatment" at San Quentin reception center beyond identification as CCCMS or EOP and certainly not anything "to prevent further deterioration of people's mental illness"); Aug. 15, 2008 Stewart Supp. Report ¶ 136 ("CDCR's Reception Centers are dangerously overcrowded and do not and cannot provide appropriate mental health care for anyone"); Sept. 10, 2008 Shansky 2d Supp. Report ¶ 79 ("acute staffing shortage, coupled with the lack of clinical exam space" prevents North Kern State Prison from providing incoming inmates with comprehensive physical examination or follow-up appointments with primary care providers); Rep Tr. at 368:12-22 (Woodford) (at San Quentin reception center, due to vacancies and "just the sheer numbers and lack of space," medical staff "were unable to keep up with physicals or providing any kind of chronic care follow-up").

If California's inmates spent only a brief time at the reception centers before being placed in other facilities, the centers' inability to provide adequate medical and mental health care to the inmates housed there would constitute a less substantial aspect of the constitutional violations at issue in this proceeding. However, inmates in California are "tend[ing] to spend significantly longer periods of time in reception centers." Nov. 9, 2007 Stewart Report ¶ 24; *see also* Nov. 9, 2007 Austin Report ¶ 27 (reporting that the CDCR routinely fails to meet its mandate to transfer inmates from reception centers to mainline institutions within sixty days). As one of plaintiffs' experts Dr. James Gilligan explained, "The dramatic levels of prison overcrowding through the state mean that individuals coming into prison are housed in 'Reception Centers' for extended periods of

time, far longer than intended." Aug. 15, 2008 Gilligan Report ¶ 26 (footnotes omitted).

The consequences of the increased lengths of stay at the reception centers along with the lack of space in those centers are particularly grave for *Coleman* class members. Dr. Packer, defendants' mental health expert, reported that mentally ill individuals "often enter[ ] the prison system with a more acute mental health presentation, not having received adequate treatment in the community and/or having abused substances there." Dec. 10, 2007 Packer Report at 20. These inmates are "disproportionately represented" among the parole violators returning to custody for short sentences, *id.*, and are thus likely to spend their entire sentence at the reception center. *Id.* Because their sentences are so short, they are frequently discharged before receiving treatment and fall into "a vicious cycle, as they decompensate in the community and quickly return . . . ." *Id.*; *see also* Aug. 15, 2008 Haney Report ¶¶ 358-59. ("[M]entally ill parolees often do not receive meaningful mental health treatment when they are on parole . . . . Frequently as a result of their decompensation, many are returned to prison, often for technical or minor violations. Thus, many of the parole violations that return them to prison are directly related to their unmet mental health needs. When they return to prison, these vulnerable prisoners are then packed into overcrowded reception centers.").

The absence of adequate mental health care at reception centers also has significant adverse consequences for mentally ill inmates admitted to serve longer sentences in state prison. The shortage of mental health care beds throughout the prison system—which we discuss in more detail below—

means that these inmates often spend months in a reception center with little or no access to necessary mental health care while waiting for a bed to open up. *See, e.g.*, Nov. 9, 2007 Stewart Report ¶ 166 (discussing impact of delays in transfer of mentally ill inmates from reception centers to necessary level of care); Aug. 15, 2008 Haney Report ¶ 105 (discussing delays in transfer of EOP inmates out of CIM reception center); *id.* ¶ 129 (discussing prolonged reception center stays and minimal treatment provided for EOP and CCCMS inmates at CIM reported by *Coleman* Special Master). For example, the number of inmates in reception centers needing an EOP level of care[47] continues to grow, *see* Ex. P243 at 900004-06, 900121-23, but the EOP program provided to these inmates falls far below the care mandated by the Program Guide for EOP patients. Aug. 15, 2008 Haney Report ¶ 29 (citing September 2006 Program Guide, Ex. P9 at 12-4-1); *see also* Nov. 9, 2007 Stewart Report ¶ 167. This is not surprising, given that the conditions in these reception centers have been described as "toxic, noxious, psychologically and medically unhealthy," Rep. Tr. at 953:13-14 (Haney), and that a lack of treatment space severely impedes efforts to provide even the most rudimentary forms of mental health care in reception centers. *E.g.*, Nov. 9, 2007 Stewart Report ¶ 80; Aug. 15, 2008 Haney Report ¶¶ 246, 247.

2. *Treatment Space*

The severe shortage of treatment space evident at CDCR reception centers affects the provision of medical and mental health care throughout the state

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[47] The various levels of mental health care are defined *supra* note 24.

prison system. Dr. Stewart reported that the "problem of adequate office and treatment space is endemic in the CDCR," Nov. 9, 2007 Stewart Report ¶ 190, and the *Plata* Receiver noted in his Turnaround Plan of Action that "investments in health care facilities have significantly lagged behind growing inmate populations, so much so that available clinical space is less than half of what is necessary for daily operations." Ex. D1133 at 25. In part, this is due to the CDCR's policy and practice of anticipating that prisons will be filled beyond their design capacity, but not including sufficient health care space to serve the anticipated population. Ex. D 1092 at 20 (*Plata* Receiver's May 15, 2007 Report Re: Overcrowding). Compounding problems caused by the lack of space, the space that does exist to provide health care services is often "woefully inadequate. Through years of neglect, the facilities have long since passed the time when modest investments could remedy the problem. We are dealing not with deferred maintenance, but with some facilities that are literally falling apart." Ex. D1133 at 25.

The court received evidence of inadequate treatment space at a variety of prisons statewide. At Avenal State Prison, staff must attempt to provide care for 7,525 inmates in space designed for less than one-third of that number. Ex. D1233 at 25 (*Plata* Receiver's Nov. 3, 2008 Analysis of Year 2007 Death Reviews).[48] At Mule Creek State Prison, a *Plata* Receivership team found that "[a]ll of the Facility Clinics are undersized for the quantity of inmate/patients seen on a daily basis and lack[ ] appropriate holding/waiting space for inmate/patients ducated

[48] Plaintiffs also offered this document into evidence as Exhibit G to Exhibit P413.

[scheduled] to be seen by health care providers." Ex. P101 at 7 (*Plata* Receiver's Custody/Security Assessment for Health Care Access at Mule Creek State Prison).

One expert who testified at trial explained that crowding has so "over-taxed" the clinical facilities at California Institution for Men that, as with the reception center at the same prison, "fundamental medical confidentiality rights are routinely ignored" in the space used to provide care to inmates housed at the prison:

> In the West facility clinic at CIM, two PCPs [primary care physicians] share one room and simultaneously see patients for sick call and other encounters. A thin fabric folding screen separates the area in which the doctors see patients from a single exam table which the PCPs must share, as the room is not large enough to accommodate a second table. In the same clinic, the registered nurse conducts face-to-face triage appointments with patients in a large room that is shared by another nurse (who may be seeing patients) and an office technician. These arrangements cannot provide for minimally adequate patient-provider privacy. Moreover, the medical treatment area is so small that there is no medically appropriate waiting area, so sick patients must wait for appointments on a small bleacher outside the clinic, exposed to the elements.

Nov. 9, 2007 Shansky Report ¶ 24. Dr. Shansky also testified about the shortage of clinical space he observed at several other prisons. *Id.* ¶¶ 16-23 (Valley State Prison for Women, Avenal State Prison, and San Quentin); Sept. 10, 2008 Shansky 2d Supp.

Report ¶¶ 31-46 (North Kern State Prison, Substance Abuse and Treatment Facility, Pleasant Valley State Prison, and California State Prison-Solano); *see also* Rep. Tr. at 663:22-665:10 (Rowlett) (testifying about clinical space shortage at California State Prison-Solano). Similarly, Secretary Woodford testified that "space represents a serious obstacle to the delivery of health care." Aug. 15, 2008 Woodford Supp. Report ¶ 27; *see also id.* ¶¶ 27-29 (discussing space issues encountered on tours of the Correctional Training Facility ("CTF") and California State Prison-Los Angeles County (Lancaster)).

As the *Plata* Receiver concluded in his supplemental report on overcrowding, "[t]here is a dire need for additional clinical space . . . in the prisons because the existing capacity has been swamped by the number of inmates in the system." Ex. D 1094 at 2 (*Plata* Receiver's June 11, 2007 Supp. Report Re: Overcrowding). On the basis of all of the evidence received at trial, there is no doubt that crowding renders the existing clinical space in California's prisons grossly inadequate.

3. *Inability To House Inmates by Classification*

Crowding also negatively impacts the state's ability to house inmates according to their proper classification, which in turn creates inadequacies in the medical and mental health care that the system is capable of providing to inmates.

A prison classification system is "an objective tool" that allows correctional staff to consider individual factors, including "age, criminal history, educational levels or deficiencies, mental health issues, [and] medical issues" so that inmates can be placed "in the appropriate custody housing level." Rep. Tr. at

149:18-24 (Scott). Prisoners in California are assigned to one of four levels of classification "based on the length of their sentence, their disciplinary history and other objective factors." Nov. 9, 2007 Woodford Report ¶ 13.

In an overcrowded system, this classification system breaks down. A "well-functioning" system of classification should have no more than 10% of prisoners housed outside their classification level. Nov. 9, 2007 Scott Report ¶ 69. In California, population pressures have forced the CDCR to house an estimated 25% of inmates outside their classification levels. *Id.* This failure to house inmates within such levels "mak[es] it harder to provide for their medical and mental health care needs," *id.* ¶ 68, and deprives the overcrowded system of "the flexibility needed to respond to inevitable crises." *Id.* As Director Scott explained, this "widespread rejection of CDCR's classification system has a significant impact on medical and mental health care":

> [I]t is harder to get health care appointments within the prison as well as out-of-prison specialty appointments, and more limited staff contact means that staff are less responsive to emergencies due to distrust, lack of understanding and compassion, and simple logistics: it is harder to get staff attention in a high-pressure, high-security unit. In addition, prisoners are subject to increased degrees of danger and potential for violence because they are placed with more dangerous and violent prisoners than their classification scores would warrant.

Id. ¶ 71. Similarly, Secretary Woodford testified that crowding makes it "impossible to move inmates where they need[ ] to be" to address inmates' medical

and mental health needs. Rep. Tr. at 375:4-6; *see also id.* at 227:4-13 (Beard) ("[H]uge overcrowding creates a problem, because you have an individual who needs to go to Institution A, and Institution A is full. So where do you put him . . . . [Y]ou end up having to put them somewhere that maybe is not the most appropriate for that individual."). Dr. Shansky likewise agreed "that the CDCR is currently unable to accommodate the housing needs of medical patients requiring specialized placement." Nov. 9, 2007 Shansky Report ¶ 126.

4. *Beds for Mentally Ill Inmates*[49]

Crowding has also created severe bed shortages at every level of the CDCR's mental health care system, causing inmates in need of higher levels of care to languish in clinically inappropriate settings. It is not simply the beds themselves that the state does not possess, but the space in which to place them. The need for such space is rapidly growing. From December 2006 to August 2008, for example, the shortage of EOP beds more than tripled to almost 1,000. Ex. P243 at 900007, 900124. Likewise, between June and September 2008, the CDCR's severe shortage of mental health crisis beds prevented more than two-thirds of the inmates referred to such beds from

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[49] Throughout this section, we cite evidence offered at trial on the number of mental health beds at each level of the mental health care delivery system above CCCMS. The *Coleman* court recently approved several projects planned by defendants to increase, in the near term, the number of such beds. June 17, 2009 Order in *Coleman*. Nonetheless, it remains to be seen whether and when defendants will comply with the *Coleman* court's June 17, 2009 order, and, in any event, compliance with that order alone will not suffice to meet defendants' constitutional obligations to the *Coleman* class. *Id.* at 5.

actually being transferred.[50] *See* Exs. P555, P586, P587, P585 (mental health crisis bed referral data from June 2008 through September 2008 showing 391 transfers out of a total of 1,424 referrals). At the level of care reserved for the most mentally ill, inmates sometimes wait as much as a year before being transferred to inpatient beds. Aug. 15, 2008 Stewart Supp. Report ¶ 20.

The shortage of mental health beds throughout the system means that large numbers of inmates in need of care cannot be transferred and do not receive the treatment their mental illness requires. *See, e.g.*, Aug. 15, 2008 Haney Report ¶ 216. Inmates requiring an EOP placement often remain in general population yards receiving only "limited mental health treatment." *Id.* Many of them decompensate and require one or more admissions to a mental health crisis bed for stabilization. *Id.* Because of the severe shortage of available mental health crisis beds, however, inmates in need of such care are frequently placed "in a variety of temporary housing alternatives" ranging from infirmaries to "telephone-booth-sized interview stalls typically placed in corridors." Ex. D 1292 at 3. "Most of these alternative placements lack suitable staffing and/or the physical configuration needed for the continuous monitoring or intensive treatment provided in a MHCB unit." *Id.* at 3-4. Suicidal inmates referred to mental health crisis beds have spent "from Thursday evening to . . . Monday morning" being transferred between so-

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[50] All inmates referred to mental health crisis beds "are suffering from severe decompensation or are a danger to themselves or others. A substantial proportion of these inmate/patients are at a high risk for suicide." Ex. D1292 at 3; *see also* Ex. D1148 at 12-1-8.

called "dry cells," which are "tiny, freestanding upright cages with mesh wiring surrounding them (and no toilet)," during the day and so-called "wet cells," which are holding cells that have toilets, at night. Aug. 15, 2008 Haney Report ¶ 156. In several instances, inmates referred to mental health crisis beds have committed suicide while awaiting transfer. *E.g.*, Nov. 9, 2007 Stewart Report ¶¶ 173-75 (inmate referred to crisis bed hanged himself after several days on a "suicide precaution protocol" in a mental health outpatient housing unit); Aug. 15, 2008 Stewart Supp. Report ¶ 100 (after determination that neither restraint room nor crisis beds were available, an inmate referred to mental health crisis bed and for possible involuntary medication returned to administrative segregation cell where he hanged himself); *id.* ¶ 109 (inmate identified as "high suicide risk" and referred to crisis bed hanged himself two days later in unlicensed infirmary at CTF).

These shortages at every level, which are caused by the lack of space resulting from overcrowding, have created a destructive feedback loop that is now endemic to the CDCR's mental health care delivery system. Inmates denied necessary mental health placements "are decompensating and are ending up in mental health conditions far more acute than necessary . . . . creat[ing] a cycle of sicker people being admitted, with greater resources necessary to treat them, which then creates even further backlog in an already overwhelmed system." Aug. 15, 2008 Stewart Supp. Report ¶ 92; *see also* Nov. 9, 2007 Stewart Report ¶¶ 31, 32; Ex. D1292 at 9-10; Dec. 10, 2007 Packer Report at 11. Because overcrowding has led to a significant, unaddressed demand for mental health services that only becomes more acute over time, new mental health beds cannot be added

quickly enough to address the system's problems. "[D]ue to the effects of overcrowding on the delivery of mental health care, any reduction in the waitlists for higher levels of care will be temporary due to the pentup demands in the system." Aug. 15, 2008 Haney Report ¶ 33.

C. *Conditions of Confinement*

The severe overcrowding in California's prisons has also affected the conditions under which members of the *Plata* and *Coleman* classes are confined. One consequence of the growing gap between the size of the CDCR population and the capacity of its prisons has been a significant increase in the use of "non-traditional" or so-called "ugly" or "bad" beds. Ex. P4 at 200; Rep. Tr. at 1912:8-14 (Kernan) (CDCR Under-secretary of Operations). These include triple bunks, housing two inmates in cells designed for one inmate, and "beds for both low-and medium-risk inmates . . . crammed into gyms and dayrooms that were never meant to be used for housing." Ex. P4 at 200; *see also* Rep. Tr. at 1912:15-17 (Kernan). The court heard testimony and saw photographic and videographic evidence of these beds. *See, e.g.*, Rep. Tr. at 148:9-149:1 (Scott); *id.* at 269:11-25 (Lehman); Exs. P336, P339, P348, P363. Director Scott, the former head of corrections in Texas, described some of the ugly beds he saw on his tours of California prisons as "truly appalling" and reported that, "[i]n more than 35 years of prison work experience, I have never seen anything like it." Nov. 9, 2007 Scott Report ¶ 11. In the October 2006 Prison Overcrowding State of Emergency Proclamation, Governor Schwarzenegger found that the CDCR was housing "more than 15,000 inmates" in these beds. Ex. P1 at 1. By August 2007, the number of inmates housed in non-traditional

beds had increased to approximately 19,600. Rep. Tr. at 1893:11-19 (Kernan); *see also* Ex. D 1252-2 at 2. At the time of trial, the department was using approximately 14,000 such beds. Rep. Tr. at 1911:9-14 (Kernan).

The use of non-traditional housing raises serious safety concerns, contributes to the spread of infectious disease, and exacerbates mental illness. First, as Secretary Woodford, former head of the CDCR, testified, the number of custodial staff is often "grossly inadequate" to meet "basic needs" with "often only two officers to supervise 200 prisoners in a gym or a dorm. This is extremely dangerous for both the prisoners and the staff because line of sight supervision is impossible under these circumstances and it does not permit the staff the time to recognize that prisoners are in trouble from any number of causes, including medical or mental illnesses."[51] Nov. 9, 2007 Woodford Report ¶ 17. One of her successors, Secretary Tilton, similarly reported that because of overcrowded conditions, including the high use of non-traditional beds, "the risk of catastrophic failure in a system strained from severe overcrowding is a constant threat." Ex. P104 at 15.

Second, crowding generates unsanitary conditions, overwhelms the infrastructure of existing prisons, and increases the risk that infectious diseases will spread. *See, e.g.*, Nov. 9, 2007 Scott Report ¶¶ 17-24. The Governor recognized such dangers when he issued his emergency proclamation on crowding, declaring that "current severe overcrowding in 29 CDCR prisons" has caused "substantial risk to the

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[51] We discuss additional problems related to inadequate staffing below, *infra* Section IV.D.1.

health and safety of CDCR staff, inmates, and the public." Ex. P1 at 1-2. Similarly, Scott Kernan, then the Chief Deputy Secretary of the Division of Adult Institutions for the CDCR, declared that overcrowding "has led to increased numbers of infectious disease outbreaks and riots and disturbances systemwide." Ex. P11 ¶ 3 (May 16, 2007 Decl. of Scott Kernan filed in *Plata*) (noting eleven different outbreaks, possible outbreaks, or exposure to tuberculosis at seven prisons). As plaintiffs' medical expert testified, "the overcrowded housing conditions, and in particular, the conditions in the non-traditional beds, including the converted gyms, create potential breeding grounds for disease." Sept. 10, 2008 Shansky 2d Supp. Report ¶ 118; *see also* Rep. Tr. at 270:7-12 (Lehman) (crowding "contributes to the difficulties of healthcare delivery by virtue of the fact that it increases the incidence of illnesses, [and] infectious disease"); *id.* at 257:15-22 (Beard) (while prisons may not always be incubators for disease, "they could be if your population densities get so intense," like "if you have a gymnasium that you triple bunk and put hundreds and hundreds of people in a closed dense area"); *id.* at 88:25-89:3 (Stewart) (interviewed two *Coleman* class members who "were suffering from staph infections that they got while living in these unhealthy conditions"); Ex. P4 at 200 (non-traditional beds "create difficult, unsanitary living conditions where ventilation is poor, toilet access is limited, and as many as 200 people might share six showers"). "Until CDCR reduces its population, it will remain highly vulnerable to outbreaks of communicable diseases, including staph infections, tuberculosis and influenza." Nov. 9, 2007 Shansky Report ¶ 135.

Third, plaintiffs' mental health experts also reported on the toxicity of non-traditional housing for members of the *Coleman* class and other inmates. As Dr. Stewart explained, "[p]lacing inmates in overcrowded gym and dorm settings is often inappropriate for people with mental health issues and can either exacerbate existing symptoms or, in some cases, trigger symptoms in people who would not otherwise display them." Aug. 15, 2008 Stewart Supp. Report ¶ 66; *see also id.* ¶ 52 (crowded dorm "settings also may exacerbate mental health conditions such as paranoia and create stressful environments for people who are otherwise vulnerable due to mental health issues, including cognitive impairment"); Aug. 15, 2008 Haney Report ¶ 291 (reporting on "extensive use of 'non-traditional' or 'bad' beds" at North Kern State Prison, which was operating at 200% design capacity, and describing housing conditions as "especially inappropriate for the confinement of mentally ill prisoners").

Finally, non-traditional beds are frequently created by "converting activity space into inmate housing areas," which adversely impacts all inmates by reducing the amount of space available for programs. Ex. P4 at 124. As the *Coleman* Special Master has explained:

> The inevitable result of severe overcrowding is that everyone also spends more and more time in their cells. General yards are more crowded, less well supervised and increasingly dangerous. There are not nearly enough walk-alone yards to provide statutorily required amounts of exercise for those who by choice or need require them. Gyms are no longer an option for time out of one's cell. Dayrooms share many of the same

> problems. Work or vocational opportunities shrink in the expanding population. Disturbances occur more frequently, with resulting increases in the number and duration of lockdowns. All inmates must spend increasingly larger chunks of their days in their cells, or much more dangerously, in one of those triple-bunked "non-traditional" spaces. None of this is conducive to the health and well-being of any inmate, much less a seriously mentally disordered inmate/patient . . . .

Ex. D1292 at 7-8. Instead, these conditions "inevitably escalate[ ] the incidence of mental illness and exacerbate[ ] the condition of those already mentally fragile and vulnerable." *Id.* at 8.

D. *Other Access to Care Issues*

Beyond the issues arising from critical space shortages, crowding has other severe impacts on access to medical and mental health care.

1. *Staffing*

The level of crowding has rendered current staffing levels insufficient to handle the health care needs of the overpopulated system:

> Many CDCR prisons are unable to sustain the basic delivery of medical, mental health, and dental services because of limited staffing (clinical and custody) and an overwhelming number of prisoner/patients who require care. Every day, many California prison wardens and health care managers make the difficult decision as to which of the class actions, *Coleman*, *Perez*, *Armstrong* or *Plata* they will fail to comply with because of staff shortages and patient loads.

Ex. D1092 at 30 (*Plata* Receiver's May 15, 2007 Report Re: Overcrowding).[52] Crowding also makes it impossible for the CDCR to hire the additional staff necessary to provide constitutionally adequate medical and mental health care to the current population.

a. Medical Staff

Defendants' own data demonstrates significant vacancy rates for medical staff. As of August 2008, 20 percent of chief physician and surgeon positions, 25 percent of physician positions, 19 percent of physician assistant positions, 39 percent of nurse practitioner positions, 10 percent of registered nurse positions, and 18 percent of licensed vocational nurse positions remained vacant. Ex. D1235-2 (charts summarizing staffing trends and indicating number of positions and number of positions filled by full-time employees). The statewide vacancy rate for primary care provider positions, which include physicians and surgeons, nurse practitioners, and physician assistants, was 27 percent. *Id.*; Nov. 9, 2007 Shansky Report ¶ 37 (explaining positions that are considered primary care providers). Some prisons have attempted to fill these vacancies with registry (contract) physicians, but this practice is insufficient as a long-term solution. "Because registry physicians tend to turn over quickly, the prisons end up spending time doing extensive on-the-job training repeatedly, which is time-consuming and detracts

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[52] *Perez v. Cate*, Case No. C05-5241 JSW (N.D.Cal.), is a statewide class action concerning dental care in California prisons. *Armstrong v. Schwarzenegger*, Case No. C94-2307 CW (N.D. Cal.), is a statewide class action concerning California prisoners and parolees with hearing, vision, mobility, kidney, and learning impairments.

from patient care delivery." Sept. 10, 2008 Shansky 2d Supp. Report ¶ 66; *see also* Nov. 9, 2007 Shansky Report ¶ 45.

"In any system, inadequate medical staffing, whether due to unfillable vacancies or insufficient allocation of positions, will result in delayed care. In a dramatically overcrowded system like the CDCR's the treatment delays become more acute." Nov. 9, 2007 Shansky Report ¶ 46. In overcrowded systems, prisoners experience "significant appointment delays," *id.*, both in terms of seeing a primary care physician and even in being triaged by a nurse to determine whether an appointment with a physician is necessary. *E.g., id.* ¶¶ 46-49; Sept. 10, 2008 Shansky 2d Supp. Report ¶¶ 67-77. In addition, "[w]ith too few primary care providers to meet the most immediate needs of the current population, some prisons are unable to develop required medical programs," including the chronic and preventive care programs required by the *Plata* policies and procedures to which defendants have committed themselves. Nov. 9, 2007 Shansky Report ¶¶ 51-53. "Even the remedies the state uses to alleviate crowding cause problems for an already overburdened staff. For example, at CTF the medical department was swamped with work because they had been ordered to review 1,500 medical files to determine which prisoners were eligible for transfer to out-of-state prisons." Aug. 15, 2008 Woodford Supp. Report ¶ 6.

In addition to rendering current medical staffing levels seriously inadequate, crowding makes it impossible for the CDCR to increase the number of clinical positions to the level needed to provide adequate care to inmates. Staffing and space issues

are inextricably intertwined such that, given the overcrowding, hiring staff alone could not solve the problem. As Secretary Lehman asked, "[W]here are the providers going to work and how"? Rep. Tr. at 272:1-13. A number of chief medical officers expressed the opinion that they would not have sufficient space for clinical staff if all of the clinical positions currently budgeted were filled, *id.* at 501:3-7 (Shansky), let alone if new positions were created and filled.

Moreover, crowding negatively impacts the recruitment and retention of clinical staff. *See, e.g.*, Nov. 9, 2007 Shansky Report ¶¶ 16, 20. Dr. Shansky explained that "[t]he clinical space allocated at San Quentin is so substandard and creates such a stressful environment that . . . the prison's capacity to retain physicians is seriously jeopardized by both the physicians' perception of personal safety issues and the unprofessional conditions." Nov. 9, 2007 Shansky Report ¶ 23. More broadly, Dr. Shansky testified:

> I believe that the hiring gains for clinicians made in the past year will be lost if these systemic issues [concerning overcrowding] are not addressed, because many newly-hired clinicians will be unwilling to risk their professional credentials and reputations by practicing in an environment where their patients are at risk of harm because among other things adequate clinical space is scarce, appointments are not scheduled, complete medical records are unavailable, and medications are not delivered.

Id. ¶ 136. The *Plata* Receiver likewise reported that crowding interferes with the "ability to recruit, hire and retain competent medical personnel. The overwhelming number of prisoners needing care at

the prisons, existing staffing shortages and inadequate clinical space are just a few of the consequences that make developing a competent medical staff a daunting challenge." Ex. D1094 at 2 (*Plata* Receiver's June 11, 2007 Supp. Report Re: Overcrowding).

b. Mental Health Staff

There are also staffing shortages "at all clinical levels" of the CDCR's mental health care delivery system, and overcrowding in California's prisons has "a profound impact" on mental health staffing levels. Rep. Tr. at 309:3-22 (Haney). Between March 2008 and August 2008, for example, the total vacancy rate among existing mental health care positions ranged from 22 percent to 36.1 percent, while the vacancy rate in psychiatrist positions was particularly high, ranging from 30.6 percent to 54.1 percent. Ex. P245 at 1. Moreover, CDCR "significantly underestimated the staffing needed to implement critical portions of the *Coleman* Program Guide requirements" in its 2008-09 staffing requests. Aug. 15, 2008 Haney Report ¶ 336 (citing Ex. P485, July 12, 2008 letter from *Coleman* Special Master to Robin Dezember and *Coleman* defense counsel reporting review of CDCR workload study). Accordingly, these high vacancy rates understate the actual level of mental health understaffing. Dr. Haney reported on the "significant staff shortages" at the eight facilities he visited, all of which he described as "[s]everely [o]vercrowded." Aug. 15, 2008 Haney Report at 56 & ¶ 335.

As Dr. Haney explained, these shortages have a serious adverse effect upon the mental health care provided to inmates.

> [S]erious staffing shortages all translate into inadequacies in the mental health delivery system and, in some instances, an outright denial of needed and mandated mental health services. In many of the units this means that professional staff are doubling up on duties, performing more tasks than they should be called upon to handle, and managing far larger caseloads than is appropriate or effective. One psychologist at CIM told me "I can't keep up with everything. I've been doing too much. We hired new staff, but that hasn't helped." He also told me "in my opinion, we are doing about 50% of what we should be doing."

Id. ¶ 335.

Although defendants need additional clinical staffing to implement necessary mental health programs, the CDCR "ha[s] been unable to recruit and retain staff even to meet the budgeted levels." *Id.* ¶ 336. This inability is directly related to the overcrowding in California's prisons. "[T]he serious deficiencies in office and treatment spaces I observed throughout the system are themselves an obstacle to ever achieving appropriate clinical staffing. The working conditions are terrible and there is no space, in any event, for more clinicians." *Id.* Dr. Stewart explained that "it is extremely difficult to recruit and retain good clinical staff in a correctional environment in the best of times," but that, "[i]n overcrowded systems, with the attended violence, high acuity, [and] shortage of office space, these ordinary recruitment problems are compounded and become significantly more difficult to overcome." Nov. 9, 2007 Stewart Report ¶ 41.

c. Custodial Staff

Crowding has also caused significant custodial staffing shortages in the CDCR that have a direct impact on defendants' ability to deliver constitutionally adequate medical and mental health care to prison inmates. "Custodial staff are essential to providing health care to prisoners because they supervise prisoner movement to and from medical appointments, they escort prisoners to services within an institution and they provide supervision when prisoners are taken out of the prison to medical appointments, hospitals or they are transferred to another institution." Nov. 9, 2007 Woodford Report ¶ 15. In addition, custodial staff are "responsible for alerting health care staff when prisoners complain of an immediate serious problem and also are supposed to observe prisoners periodically to identify actual or potential problems." Aug. 15, 2008 Woodford Supp. Report ¶ 25.

The California prison system lacks sufficient custodial staff "to keep prisoners safe from harm," *id.*, or "to provide prisoners with timely access to care and still perform other essential functions," Nov. 9, 2007 Woodford Report ¶ 15. The "paucity of correctional officers in California, due to the low staffing rate and high number of vacancies, is dangerous." Nov. 9, 2007 Scott Report ¶ 26 (footnote omitted). In fact, Director Scott testified that "every institution I toured had inadequate custodial staff on the ground to address the needs of the prisoner population, including ensuring that health care services are provided." *Id.* at 14 n.3. This "is particularly dangerous for prisoners in need of medical care . . . not just because staff are not available to escort prisoners or clinicians to appointments, but

because short-staffing can lead to forced overtime and burnout, such that staff make poor decisions, particularly in health care emergencies." *Id.* ¶ 26; *see also* Nov. 9, 2007 Woodford Report ¶¶ 16-23 (discussing dangers of understaffing correctional officer positions). As Director Scott testified:

> [O]verworked staff without adequate back-up are less able to respond to emergencies and more likely to downplay prisoners' concerns. In a housing unit such as San Quentin's H Unit Dorm 2 (one officer for 200 prisoners) or CIM's West Facility Cleveland Hall (two officers for 198 prisoners) or East Facility gym (two officers for 202 prisoners), staff in an emergency can only sound the alarm, make frantic telephone or radio calls, and hope for backup. An officer alone with several hundred inmates is unlikely, for example, to perform emergency first aid or CPR—it is simply unsafe to do so with no backup, when prisoners could easily simulate an emergency as a diversion. The inability to perform basic lifesaving functions could have potentially devastating consequences on the life and health of a prisoner undergoing a medical or mental health emergency. This situation presents an unacceptable risk of harm to prisoners.

Nov. 9, 2007 Scott Report ¶ 59.

In addition, the *Plata* Receiver has explained that, "[s]ystem-wide, CDCR lacks the custody staff and organizational structure and processes to ensure that patient-inmates are reliably escorted and/or transported to medical appointments." Ex. D1133 at 5 (*Plata* Receiver's June 6, 2008 Turnaround Plan of Action). This results in denial of "timely access to health care services" and "substantially increas[es]

the risk that patient-inmates' health will further deteriorate." *Id.* Dr. Shansky also concluded that lack of adequate custodial staff causes "significant delays in treatment . . . because there are not enough custody officers to move the prisoners in and out of the clinics on a timely basis." Sept. 10, 2008 Shansky 2d Supp. Report ¶ 107. Similarly, defendants' own mental health expert testified that the shortage of correctional officers statewide impedes the delivery of mental health care to members of the *Coleman* class, particularly CCCMS inmates. Dec. 10, 2007 Packer Report at 15-16. A reduction in the crowding of California's prisons would help ease the burden on the custodial staff and permit staff members to better monitor inmates for medical or mental health problems and to deliver inmates for necessary care.

2. *Medication Management*

Next, crowding prevents defendants from achieving an adequate medication delivery system that is marked by "the timely delivery of the correct medication to the correct patient, with accurate documentation of what has been administered." Nov. 9, 2007 Shansky Report ¶ 79. "Defendants' medication delivery systems are inadequate for the size of the population they serve, and are plagued by short-staffing at a number of prisons . . . . [Consequently,] prisoners receive their medications late or not at all, and suffer as a result." *Id.* ¶ 80. "The shortcomings in the medication delivery system are rooted in overcrowding—quite simply, there are more patients requiring medications than the prison has the resources or staffing to address." *Id.* ¶ 81.

Overcrowding affects the administration of both traditional medications to *Plata* class members and psychotropic medications to *Coleman* class members.

See, e.g., Rep. Tr. at 77:21-79:24 (Stewart); Aug. 15, 2008 Stewart Supp. Report ¶ 96. As Dr. Stewart testified, "[t]here are just too many people that are prescribed too many medications" for the system to handle. Rep. Tr. at 77:19-20. Following tours of Salinas Valley State Prison, California Medical Facility, and Mule Creek State Prison, Dr. Stewart reported that:

> First, due to the lack of adequate staff to distribute medications and the overwhelming number of inmates prescribed medications, staff members do not have sufficient time to adequately monitor whether inmates are taking medications properly . . . . Second, the clinical staff members who distribute medications are too understaffed to evaluate the efficacy and potential side effects of the prescribed medications. Every patient I talked to about the medication distribution system described the same drive-by process—they received their medications in pill lines or at their cell doors from staff members who spent only a few seconds with them. The staff members never ask the patients about the efficacy of the medications or whether they are causing side effects. Third, psychiatrists are also overburdened and may consist largely of contract employees that are unable to maintain consistent relationships with their patients due to constant movements between units or even prisons.

Aug. 15, 2008 Stewart Supp. Report ¶ 96; *see also id.* ¶ 95; Rep. Tr. at 670:9-673:10 (Rowlett) (correctional officer discussing similar problems based on her experience at California State Prison-Solano).

The failure of the CDCR's medication delivery systems results in not only traditional medical

problems, but also high medication non-compliance rates among patients with serious mental illness. Blood samples taken of seriously mentally ill CDCR inmates admitted to DMH inpatient care units over more than two years show that the vast majority of such inmates have little or no psychotropic medication in their systems. *See* Brewer Dep. at 135:5-137:25; *see also* Aug. 15, 2008 Stewart Supp. Report ¶¶ 98-99 (reporting information provided by Drs. Neill and Gandhi, DMH Program Directors for Salinas Valley and CMF, respectively). The Executive Director of the DMH inpatient psychiatric programs at Salinas Valley and CMF testified that this is a "serious problem," Sept. 4, 2008 Brewer Dep. at 127:17-18, the consequence of which is that acuity levels in mentally ill inmates admitted to DMH units are rising, inmates admitted to inpatient care "are taking longer to stabilize on medications" and often require orders for involuntary medication, and, upon discharge, the inmates "are then returned to the same system that fails to adequately monitor medication compliance, thereby starting the cycle all over again." Aug. 15, 2008 Stewart Supp. Report ¶ 100.

3. *Specialty Medical Care*

The CDCR is also unable to provide access to "specialty [medical] services, including in urgent (high priority) cases, in accord with [its own] policy requirements." Nov. 9, 2007 Shansky Report ¶ 56. As a "result of overcrowding, the number of prisoners who need such services exceeds the capacity of the providers available to CDCR, and/or is so great that CDCR cannot adequately track and schedule such cases." *Id.* For example, at Avenal State Prison, Dr. Shansky reviewed two reports printed the day of his visit in the fall of 2007. *Id.* ¶ 61. Those reports

showed 1,293 pending specialty referrals, 316 urgent and 977 routine. *Id.* Of the 316 pending urgent referrals, only approximately 105 had an appointment date, with only 2 of the 316 urgent referrals—a dismal 0.6 percent—scheduled to take place within the fourteen-day period required by CDCR policy for such appointments. *Id.* Of the 977 pending routine referrals, only approximately 285 had a scheduled appointment date, and only approximately 135 of the 977 routine referrals—approximately fourteen percent—were scheduled to occur within the three-month period required by CDCR policy for such appointments. *Id.* ¶ 62. While Avenal provides the starkest numbers, the problem exists at other prisons as well. *E.g., id.* ¶ 65 (more than 50 percent of urgent referrals on pending list at High Desert State Prison were pending for longer than fourteen-day period required by CDCR policy); Sept. 10, 2008 Shansky 2d Supp. Report ¶¶ 88-94 (discussing specialty care problems at four prisons and concluding that "[t]he demand for care, particularly for the high priority cases, continues to overwhelm the resources available to the defendants").

Prison staff at Avenal indicated that "they were not confident that the reports [of pending specialty care referrals] were entirely accurate," and that some referrals that appeared as pending may have actually taken place but were not yet closed out in the system as having been completed. Nov. 9, 2007 Shansky Report ¶ 63. However,

> to the extent that the aging report data is incorrect, then it reflects that the prison has more patient data than it is capable of processing, leaving [Avenal State Prison] unable to determine who actually needs the services,

> with the distinct possibility of prisoners being double-scheduled (and thus delaying specialty services for other prisoners still actually in need of an appointment).

Id. ¶ 64. Put simply, even if the specialty care numbers are not as dire as the reports indicate—and it would be difficult to do worse than having only 0.6 percent of pending urgent referrals scheduled within the fourteen-day period mandated by CDCR policy—"[Avenal's] population exceeds its capacity for scheduling and tracking." *Id.*

4. *Lockdowns*

Delays in access to care are even more acute during periods when prisons are in lockdowns. *See, e.g.*, Sept. 10, 2008 Shansky 2d Supp. Report ¶¶ 108-11 (discussing impact of lockdowns at Pleasant Valley State Prison and High Desert State Prison). Because of crowding, the California prison officials who administer the state's thirty-three adult prison institutions

> rely largely on lockdowns to control their system . . . . [I]n 2006, they had 449 lockdowns, which averaged 12 days a lockdown. And they had 20 or so of those lockdowns that were over 60 days. Those things impact upon your ability to properly deliver any service within an institution, including mental health and medical services.

Rep. Tr. at 218:18-25 (Beard); *see also* Nov. 9, 2007 Scott Report ¶ 63 ("Overcrowding engenders a state of perpetual crisis that shuts down non-emergency prison functions."). As Dr. Haney explained:

> Lockdowns are used in the California Department of Corrections, I believe, in large part because of the profound level of overcrowding at a level that is unheard of in corrections departments across the United States with which I'm familiar.
>
> Lockdowns mean that prisoners, including EOP prisoners, if they are in a unit that is locked down, are essentially without programs during the periods of time that the lockdown is in place.
>
> There are housing units in the California Department of Corrections that are locked down more often than they are unlocked.

Rep. Tr. at 316:23-317:9; *see also id.* at 70:4-6 (Stewart) ("The fact that there's too many inmates at the Salinas Valley State Prison in the general population yard . . . resulted in an almost continuous lockdown.").

Lockdowns require a "radically different form of medical delivery than the services provided under normal general population conditions." Ex. D1092 at 29 (*Plata* Receiver's May 15, 2007 Report Re: Overcrowding). When a prison is in lockdown, inmates housed in the general population are unable to "leave their housing units to go to yard clinics" to access medical care; instead, "clinical staff must go from cell to cell to see the prisoner/patient, or small groups or individual prisoners must be escorted by correctional officers to and from clinic areas." *Id.* at 29-30. California prisons "are not staffed" for this type of situation, where staff "must escort prisoners to every service or bring the service to them." Nov. 9, 2007 Woodford Report ¶ 25.

Likewise, lockdowns affect the delivery of mental health care in several ways. Inmates frequently cannot leave their cells to attend necessary treatment programs. Rep. Tr. at 881:4-10 (Dezember); Nov. 9, 2007 Stewart Report ¶ 138; Aug. 15, 2008 Stewart Supp. Report ¶¶ 34, 38. Additionally, lockdowns prevent staff from supervising the intake of psychotropic medications. Aug. 15, 2008 Stewart Supp. Report ¶ 96 (noting that lockdowns "result[ ] in distributions of medications through food ports or otherwise at cell doors, where it is difficult to monitor compliance with medication regimens"). Finally, some mentally ill prisoners "cannot handle the severe stress of locked-down confinement" and "may decompensate or become suicidal as a result." Aug. 15, 2008 Haney Report ¶ 166.

E. *Medical Records*

Another deficiency in the delivery of medical and mental health care to California inmates concerns medical records. For example, Director Scott testified that the CDCR "cannot track and transfer essential health care records, because the record system lacks the capacity to deliver records regarding this many prisoners." Nov. 9, 2007 Scott Report ¶ 78. As he explained,

> given the extraordinary number of prisoners in these facilities, it is simply impossible to manually file so many records on a timely basis. In my experience, such extraordinary pressure on staff also leads to serious filing errors, which means that even records that have been filed might not be available to clinicians, and might be impossible ever to locate.

Id.

Dr. Shansky's observations similarly revealed medical records that were "dangerously incomplete." Nov. 9, 2007 Shansky Report ¶ 101; *see also id.* ¶ 106 (at Avenal State Prison, "the amount of documents generated had simply overwhelmed the staff's capacity to timely and properly place documents in prisoners' [unit health records]"); *id.* ¶ 107 (at High Desert State Prison, 107 inches of loose filing remained, and even those documents that are filed are only placed rather than fastened into inmates' health files, which "greatly increases the chance of documents being lost or misplaced"); *cf.* Nov. 9, 2007 Scott Report ¶ 78 (noting observation of "four feet of loose filing waiting to be placed in prisoners' health records" at Avenal, a prison at over 200% of design capacity). Dr. Shansky summarized his observations as follows:

> At each of the prisons I inspected, I found that the medical records were unwieldy, rarely organized chronologically and, in general, poorly maintained. Retrieving useful information from the files invariably requires considerable time sifting through extraneous reports, misfiled documents and outdated materials. At the same time, certain documents that would be extremely useful, such as an updated "Problem List" for each file, which is required by the court-ordered *Plata* Policies and Procedures [to which defendants stipulated], are typically missing.

Sept. 10, 2008 Shansky 2d Supp. Report ¶ 99. Dr. Shansky further testified that "CDCR's tracking and information systems cannot keep up with the overwhelming data requirements in the system's overcrowded prisons." *Id.* ¶ 102; *see also* Nov. 9, 2007 Shansky Report ¶ 110 (noting that adequate care requires timely appointments, which in turn requires

an effective scheduling and tracking system, something that "CDCR has proven itself incapable of developing . . . due in large part to the sheer numbers of patients and their vast and growing need for coordinated appointments").

The deficiencies in the management of medical records extend to mental health care as well. Defendants' mental health expert Dr. Packer described several such deficiencies:

> In several institutions there were difficulties in clinical staff obtaining charts in a timely manner (that is, the charts were not available when needed for a clinical assessment) as well as difficulties in updating the charts (that is, delays in notes being placed in the records). Staff referred to a category of "Flimsy charts, meaning that they sometimes had limited information available when doing an assessment. The documentation I reviewed also described institutions in which there were significant numbers of charts unfiled.

Dec. 10, 2007 Packer Report at 19. Dr. Packer opined that the medical records problem "is a direct effect of overcrowding," and that "[t]his problem does impact directly on the ability to provide timely and appropriate care." *Id.* at 19-20; *see also* Rep. Tr. at 1119:2-5 (expressing his "opinion that the sheer number of inmates in the system is the most direct cause resulting in the difficulty of CDCR to manage their medical records appropriately").

Plaintiffs' expert Dr. Stewart reviewed approximately sixty medical records during his tours and reported that he "consistently found the records to be unwieldy, disorganized and bulky, with loose papers

floating around in the files," and that "[i]t was exceedingly difficult to follow the clinical course of treatment of the patients because of the size and disorganization of the files." Aug. 15, 2008 Stewart Supp. Report ¶ 102. He also reported "a few instances where [he] found other patients' records in the files [he] reviewed." *Id.* He described these problems as "typical in an overwhelmed and overcrowded system." *Id.*

As Dr. Stewart explained,

> [a]ccurate well organized medical records are a critical element of medical and mental health care. They are even more essential in a complex and overcrowded system such as the CDCR which is characterized by frequent transfers of patients, high turnover of clinical staff and overuse of contract clinicians who lack familiarity with the patients and the system itself.

Id. According to Dr. Shansky, "[u]nless medical records and scheduling information are managed, organized, and maintained effectively, appropriate health care services cannot be provided. *Overcrowding makes it impossible* for CDCR to perform these essential functions." Nov. 9, 2007 Shansky Report ¶ 97 (emphasis added).

F. *Increasing Acuity of Mental Illness*

Finally, and alarmingly, the evidence shows that crowded conditions, and the bed and staffing shortages and delays in access to necessary care that result from crowding, intensify the acuity of mental illness among inmates throughout the California prison system. As Dr. Stewart explained:

> [I]nsufficient access to higher levels of care has created a system which is overwhelmed by the acuity of its patients at every level of care. EOP units house many patients in need of inpatient care, MHCB's house patients in need of inpatient hospitalization, intermediate care facility units house many patients in need of acute hospital care and so on. When and if these patients finally reach the level of care they require, their mental health conditions may be far more serious, resulting in longer stays and more resources in order to stabilize and get well.

Aug. 15, 2008 Stewart Supp. Report ¶ 43 (footnote omitted); *see also id.* ¶ 88 ("It was clear that the severe shortage of mental health beds has created a system that houses a significant portion of *Coleman* class members at lower levels of care than the patients clinically require."). Dr. Stewart reported that he was "struck by the very high acuity of the patients [he] encountered during [his] tours because they were much sicker, as a whole, than the *Coleman* class members [he] encountered between 1990 and 2000," when he served as a court-appointed monitor at CMF. *Id.* ¶ 88. Dr. Stewart attributed this directly to overcrowding:

> The reality of the current MHSDS system, as demonstrated by my interviews with these class members and the admitted shortage of EOP, MHCB and inpatient beds, is that too many people are housed in places that simply cannot provide them with the level of mental health care they require. This is a direct result of overcrowding—there are too many people in the system and too few resources to treat them. This in turn means that the acuity level at every level of

> care is higher than it would be in a system that has sufficient inpatient beds.

Id. ¶ 91.

Dr. Haney similarly reported that "there is evidence that the *worsening* prison overcrowding crisis has had a *corresponding* effect on the quality of mental health care." Aug. 15, 2008 Haney Report ¶ 373 (emphasis in original). At trial, he testified that mentally ill inmates in need of higher levels of mental health care are "getting sicker as a result of their inability to get the appropriate level of care," Rep. Tr. at 304:16-19, and he agreed that overcrowding in California's prisons is resulting in more significant mental illness than one would find at a "properly run prison with proper population" and "an adequately functioning mental health care delivery system." *Id.* at 305:24-306:5.

G. *Extreme Departures from the Standard of Care and Preventable or Possibly Preventable Deaths, Including Suicides*

All of the above problems, caused by crowded conditions, ultimately contribute to unacceptably high numbers of both preventable or possibly preventable deaths, including suicides, and extreme departures from the standard of care.

In 2006, California had a prisoner suicide rate of 25.1 suicides per 100,000 inmates, compared to the national average of 14 per 100,000. Ex. P58 at 9 (*Coleman* Special Master's Report on Suicides Completed in the CDCR in Calendar Year 2006).[53] In re-

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[53] Because the record does not contain evidence of the number of suicides in 2007 or 2008, it is unclear from the record whether California's inmate suicide rate has risen or declined since 2006.

viewing these suicides, the Special Master found that "72.1 percent of completed suicides in 2006 involved some measure of inadequate treatment or intervention and were, therefore, most probably foreseeable and/or preventable." *Id.* at 8. Since 2003, the percentage of suicides found to be foreseeable or preventable each year has remained relatively constant at around 75 percent, representing "marked increases over the 45 percent rate of inadequate treatment that was found for suicides that occurred in 2002." *Id.* at 8. While we do not suggest that crowded conditions are the sole cause of the increase in the suicide rate among California inmates, the evidence demonstrates that crowding throughout the prison system has a significant effect on many of the risk factors that contribute to inmate suicides. "Major contributing factors" to foreseeable and preventable suicides include "inadequate clinical assessments, inappropriate interventions, incomplete referrals, missed appointments and appointments that were not rescheduled, unsupported diagnoses, failure to review records, assignments to inappropriate levels of mental health care, failure to provide protective housing, and the provision of inadequate or untimely resuscitation efforts." Ex. D1281 at 680. As our discussion above makes clear, crowding is a major cause of nearly all of these factors.

The *Plata* Receiver also reviews inmate deaths to determine whether any deaths were preventable or possibly preventable. In 2007, of the 110 deaths con-

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It appears, however, that the suicide rate is not appreciably lower, as the CDCR reported 31 apparent suicides to the *Coleman* Special Master during the first ten months of 2008. *See* Ex. P 171-R; Ex. P506. If annualized, this equates to approximately twenty-four suicides per 100,000 inmates for calendar year 2008, based on an in-state inmate population of 156,352.

sidered to be unexpected and not the result of homicide or self-inflicted injuries, 44 deaths (40 percent) were found to be preventable or possibly preventable, Ex. D 1233 at 8 (*Plata* Receiver's Nov. 3, 2008 Analysis of Year 2007 Death Reviews), meaning that "better medical management or a better system of care would likely have" or "may have prevented the patient's death," *id.* at 5. Dr. Shansky testified that this rate was "extremely high." Rep. Tr. at 428:23-429:7. The Receiver also examined "extreme departures from the standard of care," defined as "lapse[s] in care that a reasonable and competent clinician would not render under the same or similar circumstances." Ex. D1233 at 5, 15. He found extreme lapses in nearly 60 percent of the inmate deaths he reviewed. *See id.* at 9-13. Dr. Shansky testified that this is an extraordinarily high rate, and that in the Illinois prison system he would see extreme departures from the standard of care in only five to ten percent of inmate deaths. Rep. Tr. at 428:9-17. According to Dr. Shansky, there was no question that a number of the lapses were "related to crowding." *Id.* at 427:17-428:4, 430:21-431:3.

Defendants presented evidence that California had the fourteenth lowest "average annual illness mortality [rate] per 100,000 state prisoners from 2001 to 2004" in the United States. Rep. Tr. at 1272:12-21 (Mumola). However, these statistics failed to control for demographics of each state's inmate population; the statistics are therefore of limited value in comparing states. Aug. 27, 2008 Reingold Report ¶¶ 10-11, 15, 24. Furthermore, California has the fourth lowest death rate among all fifty states, and the fifth lowest after controlling for age. *Id.* ¶ 12. "Thus, while California has a very low death rate for its general population, its death rate for state prisoners is relatively

higher." *Id.* ¶ 14. In any event, serious deficiencies continue to exist in the California prison system such that California inmates are not receiving adequate care. This is true regardless of where California might rank in a valid comparison of inmate death rates among the states.

H. *Expert Opinions Regarding Causation*

Based on their observations of crowded conditions in California's prisons, including those discussed above, as well as on their extensive experience in working in or managing crowded prisons,[54] seven experts testified that crowding is the primary cause of California's inability to provide constitutionally adequate medical and mental health care to its inmates.[55] Four of the experts are current or former state prison system administrators who have led correctional agencies in five states, including California. Jeanne Woodford—who worked for the CDCR for twenty-seven years in various capacities, including as warden at San Quentin and as acting Secretary of the CDCR, Nov. 9, 2007 Woodford Report ¶ 1—testified that she "absolutely believe[s] the primary cause is overcrowding." Rep. Tr. at 376:3-9; *see also id.* at 383:4-10; Nov. 9, 2007 Woodford Report ¶ 6. Doyle Wayne Scott—who worked for thirty years for the Texas Department of

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[54] *E.g.*, Nov. 9, 2007 Woodford Report ¶ 7; Nov. 9, 2007 Scott Report ¶¶ 4-5; Aug. 15, 2008 Lehman Report ¶ 7; Rep. Tr. at 263:24-267:12 (Lehman); *id.* at 209:9-14 (Beard).

[55] As we have previously explained, while "the primary cause issue is ultimately a question of law for the three-judge court to decide, the Federal Rules of Evidence allow experts to express opinions that embrace the ultimate issue in a case," including the issue of causation. Nov. 3, 2008 Order at 10-11 (citing Fed.R.Evid. 704(a) and other authority).

Criminal Justice, the second largest prison system in the United States after California, including five years as its Executive Director, and has served as an expert consultant to the National Institute of Corrections and seven prison systems throughout the United States and Puerto Rico, Nov. 9, 2007 Scott Report ¶¶ 1, 4—similarly testified that:

> Everything revolves around overcrowding. The deficiencies in the classification plan, the deficiencies in the unavailability of staff because they are doing other tasks associated with overcrowding problems to do onsite medical appointments or offsite medical appointments, the wear and tear on the infrastructure. I know there have been electrical outages because of the overload that the large number of offenders is causing at institutions. There's also been water problems at a number of the institutions, and I think the Governor's proclamation clearly described a lot of those issues.

Rep. Tr. at 152:6-15. Director Scott therefore opined that "overcrowding is the primary cause of the medical and mental health care violations in California prisons." *Id.* at 152:1-6; *see also* Nov. 9, 2007 Scott Report ¶ 80. Joseph Lehman—who has over thirty-five years of experience in corrections, including fifteen combined years as head of corrections in Pennsylvania, Washington, and Maine, Aug. 15, 2008 Lehman Report ¶ 1—also rendered his expert opinion that crowding "is the primary cause of the inability to provide [medical and mental health] services. It's overwhelming the system both in terms of sheer numbers, in terms of the space available, in terms of providing healthcare." Rep. Tr. at 270:25-271:6. Likewise, Jeffrey Beard—a licensed psychologist who has worked

for the Pennsylvania Department of Corrections for over thirty-six years, including serving as its Secretary since 2001, *id.* at 200:15-201:7—testified that, in his opinion, "the biggest inhibiting factor right now in California being able to deliver appropriate mental health and medical care is the severe overcrowding of [the] system." *Id.* at 219:7-10.

At least three of these four experts who had headed state prison systems had never before testified on behalf of a prisoner, and at least two of them were not paid for their time as experts in this case. Rep. Tr. at 153:12-14 (Scott) (never testified on behalf of a prisoner or class of prisoners); *id.* at 230:2-10 (Beard) (never testified for plaintiffs in thirty-six years as a corrections professional, and not paid for testimony in this case); *id.* at 273:6-10 (Lehman) (never testified on behalf of prisoners in thirty-five years of experience); *id.* at 385:12-14 (Woodford) (not paid for testimony in this case). They decided to testify on plaintiffs' behalf in this case because "the situation in California is so egregious," *id.* at 273:11-12 (Lehman); and because "the prisons aren't safe," "nobody seems to be willing to step up to the plate and fix the problem," and "if there's anything I can do to help see that California moves in [the right] direction ... that's why I'm here today," *id.* at 231:13-20 (Beard). Secretary Woodford, the former warden at San Quentin and acting Secretary of the CDCR, explained that she testified:

> because I truly believe that we can do better than we are in California. I think it's unbelievable that in this state that we have the kind of overcrowded conditions that we have; that we do little or nothing to prepare people for the return

> to society in spite of the fact that we parole 10,000 people a month from our prison system.
>
> And I absolutely believe that we make people worse, and that we are not meeting public safety by the way we treat people.
>
> And that I believe overcrowding is prohibiting us from providing quality medical care and mental healthcare to inmates in our system.
>
> And for California to be in the shape that it's in is just unbelievable.

Id. at 385:17-386:5 (Woodford).

In addition to these present or former heads of state prison systems, three other experts testified on plaintiffs' behalf that crowding is the primary cause of the constitutional violations at issue in *Plata* and *Coleman*. Dr. Ronald Shansky—a physician who has worked primarily in correctional health care for over thirty-six years, including twelve years as Medical Director of the Illinois Department of Corrections and five years as a medical consultant to the CDCR, and who has been involved "with over two dozen other correctional systems as either a court-appointed expert /monitor/special master or as a consultant retained by the correctional system," including five years as a court-appointed receiver of the District of Columbia Jail Medical and Mental Health Program, Nov. 9, 2007 Shansky Report ¶¶ 2-3—explained that:

> the CDCR's medical care delivery system cannot provide a constitutional level of care because the prison system incarcerates far more prisoners than can be adequately treated with the resources, staffing and facilities available in the CDCR. In short, it is my opinion that overcrowding is the

> primary cause of the constitutional violations in the CDCR for *Plata* class members.

Sept. 10, 2008 Shansky 2d Supp. Report ¶ 7; *see also* Nov. 9, 2007 Shansky Report ¶¶ 136-38. Dr. Shansky is "confident" in his conclusion. Rep. Tr. at 423:8-14.

Dr. Craig Haney—a professor of psychology at the University of California, Santa Cruz, who has studied "the psychological effects of living and working in institutional environments" for thirty-five years and has toured, inspected, and analyzed conditions of confinement in prisons in twenty states, three maximum security federal prisons, and prisons in five other countries, Aug. 15, 2008 Haney Report ¶¶ 1-3—similarly testified that:

> Because of the tremendous importance of overcrowding and its impact on virtually every aspect of prison life, it is my opinion that it is the primary cause of the continuing constitutional violations that plague the California prison system, including the CDCR's inability to provide medical and mental health care for state prisoners that meets the relevant constitutional minimum standards.

Id. ¶ 17; *see also id.* ¶ 364 (overcrowding is a crisis "that now consumes the CDCR and prevents it from discharging its constitutional responsibilities"). Dr. Haney further explained that:

> I don't believe in a system this overcrowded at this magnitude of overcrowding with overcrowding as widespread as it has been in California for as long a period that it has been that there's any other plausible or credible explanation for the failure of the system to provide constitutionally-adequate mental healthcare.

> The court's been monitoring this issue for many, many years. There have been many, many court orders, and there have been many activities that have been engaged in in [sic] trying to bring this system's mental health care delivery into constitutional compliance.
>
> In the face of all of those efforts there has been this overwhelming overcrowding problem of such a degree, magnitude and duration that it has incapacitated the system's ability to deliver constitutionally-adequate care.

Rep. Tr. at 317:18-318:7.

Dr. Pablo Stewart—a licensed psychiatrist and clinical professor of psychiatry at the University of California, San Francisco, with over twenty years of experience in correctional psychiatry, including service as a court-appointed expert in several federal class action lawsuits concerning the delivery of mental health care in prisons and jails, Nov. 9, 2007 Stewart Report ¶¶ 1-15—testified that the "conclusion that overcrowding is the primary cause" of the constitutional violations in *Coleman* is "inescapable." *See id.* ¶ 196; Aug. 15, 2008 Stewart Supp. Report ¶ 111. Dr. Stewart's opinion is predicated on the persistent nature of the constitutional violations in *Coleman*:

> [T]aken together, the range of Constitutional violations . . . including inadequate suicide monitoring and prevention, inability to timely access appropriate levels of care, inability to timely access mental health clinicians due to staffing shortage, and inadequate medication management practices are unusual in a system that has been under Court supervision for more than ten years. These serious, dangerous violations this late

> in the remedial process are typical indicators of a system plagued by severe overcrowding. In a non-crowded system, the Constitutional violations are more readily addressed by such interventions as increased staff and increased programming. However, in a system overwhelmed by crowding, these traditional remedies are woefully inadequate. This appears to be the case in the CDCR where remedial efforts have resulted in significant expansions of staffing and programming activities, yet the constitutional violations persist or even worsen.

Id. ¶ 112. Dr. Stewart's opinion is also based on "the fact that the percentage of persons with serious mental illness in the CDCR is increasing faster than the overall CDCR population," a phenomenon that "is typical of overcrowded systems because . . . overcrowding creates new mental health needs and exacerbates existing mental health needs." *Id.* ¶¶ 114, 116. Finally, Dr. Stewart found that:

> The causal link between overcrowding and unconstitutional mental health care is clear and direct in the many CDCR housing units where space shortages from overcrowding directly result in long-term living arrangements that are harmful to the mental health of *Coleman* class members. . . . These same harsh conditions, as discussed earlier, also increase the demand for mental health services in the general population who, in a properly operating, not overcrowded system, would not need mental health services. Isolation, seclusion, idleness, violence, fear and stress plague the prisoners in the CDCR as a direct result of overcrowding. These conditions exacerbate mental illness and are serious bar-

> riers to the provision of minimally adequate mental health and medical care.

Id. ¶ 117.

Defendants' expert Dr. David Thomas—an ophthalmologist for almost forty years who served in various capacities at the Florida Department of Corrections for nine years, most recently as Assistant Secretary for Health Services and Director of Health Services, and who now serves as a professor of surgery and correctional medicine at Nova Southeastern University in Fort Lauderdale, Florida, Nov. 9, 2007 Thomas Report ¶¶ 1-2—was the only expert who testified that crowding was not the primary cause of constitutional deficiencies in the delivery of medical care in California's prisons. *See, e.g.*, Rep. Tr. at 1217:11-13. Instead, Dr. Thomas testified that "the single most important item in achieving a sound Constitutional level of care is a culture that fosters providing care at that level." Nov. 9, 2007 Thomas Report ¶ 11 (emphasis omitted). In his opinion, the "empowerment of [health care] staff"—unlike in the past, when "security services dominated the prison system and program services existed only at the whim of security services"—is "the crux of having a constitutional level of health care." Addendum to Thomas Report ¶ 1. He further explained that:

> The culture was such prior to appointing of the Receiver that this was a security-driven system without regard for any other programs or any other constitutional requirements. Since the Receiver has been appointed, . . . there is clear indication that the culture is shifting in the department to understand the need for a correctional healthcare system that works on a constitutional level of healthcare.

Rep. Tr. at 1215:21-1216:3. According to Dr. Thomas, a constitutional system of delivering medical care cannot be developed without the change away from a custody-oriented culture that is now underway, and a reduction in crowding might make it easier to develop such a system, but it is not necessary and will not, without more, lead to a constitutionally adequate system of care. *See, e.g.*, Addendum to Thomas Report ¶ 4.

We find the testimony of Dr. Thomas to be unpersuasive for several reasons. First, Dr. Thomas's testimony that reducing crowding will not, without more, remedy the constitutional violations at issue in *Plata* does not mean that crowding is not the primary cause of those violations. Indeed, we find that reducing crowding is a necessary but not sufficient condition for eliminating the constitutional deficiencies in the provision of medical care to California's inmate population. Other steps will be necessary to fully remedy the deficiencies in the CDCR's medical and mental health care services. Nonetheless, a problem that has multiple causes will ordinarily still have a primary cause. As Dr. Shansky explained, "Reducing overcrowding is not a panacea, but crowding is the primary cause of the ongoing inadequate medical care in the CDCR system. Overcrowding is the one factor that negatively impacts almost every other matter that must be addressed to create a minimally adequate medical care delivery system for California's prisons." Sept. 10, 2008 Shansky 2d Supp. Report ¶ 9; *see also supra* Section IV.A.

Second, as Dr. Beard testified, a culture that allows "custodial interference with the delivery of care" is problematic, but "you have to realize that the culture grew out of the overcrowding." Rep. Tr. at 221:17-

222:9. Crowded conditions force prison administrators "to take a strong custodial approach. . . . They have to rely on the lockdowns. They have to rely on guns, gas, those kinds of things, to control the prisons so they're safe for the staff and for their inmates." *Id.* at 222:14-21. Thus, although we agree with Dr. Thomas that a custody-dominated culture is a barrier to delivering constitutionally adequate care, we also agree with Dr. Beard that "[i]f you try to change the culture, you can't. You can't change the culture until you reduce the population and can make the institution safe." *Id.* at 222:22-24. Consequently, it is crowding and not culture that is the primary cause of the unconstitutional system of health care delivery in California's prisons.

Third, we give less weight to the testimony of Dr. Thomas because he formed his opinions and drafted his initial report before visiting even a single prison in California. *Id.* at 1220:20-22 (Thomas). Although he subsequently visited eight prisons and opined that those visits supported his initial views, he took no notes during or after those tours; did not make any audio or video recordings during the tours; reviewed fewer than ten medical records at each prison and could not recall any details of any of the medical files he reviewed; and did not recall how many staff members he talked to at each prison or whether he asked the staff members at each prison any of the same questions. *Id.* at 1228:17-1229:3, 1229:21-1231:9, 1236:1-4, 1240:2-14 (Thomas).

Fourth, some of the testimony by Dr. Thomas was both internally inconsistent and patently incredible. For instance, Dr. Thomas testified that he believed all eight prisons he visited were "richly staffed," yet he earlier testified that "outcome measurements of

work study programs" should be used to determine staffing ratios and he had not conducted or seen any such studies of the California prison system. *Id.* at 1197:18-1198:6, 1251:2-17. He also suggested that providing treatment in a men's restroom would be appropriate because "one has to be creative . . . in corrections," and that treatment could also be provided in closets, *id.* at 1223:7-12, 1226:8-15, although he provided other, more plausible suggestions, such as using space more frequently on weekends or adding modular buildings.

Finally, even if we were to credit Dr. Thomas's opinions in their entirety, we find such opinions to be overwhelmingly outweighed by the testimony of the numerous other, more qualified experts cited above. Defendants argue that the opinions of some of plaintiffs' experts must be discounted because of the role played by plaintiffs' counsel in drafting the expert reports. However, upon review of all of the relevant testimony, we are convinced that the opinions contained in the expert reports are those of the experts themselves, and that plaintiffs' counsel did not impermissibly influence any of the experts' opinions. *See, e.g., id.* at 181:16-182:5 (Scott) (testifying that the opinions in his expert report were "mine and only mine" and that, before signing his reports, he reviewed every word, "[a]ll the way down to the grammatical remarks," to ensure that they accurately reflected his opinions); Pls.' Opp'n to Defs.' Mot. in Limine No. 9 to Exclude Expert Reports at 2-5 (citing deposition testimony by Director Scott, Dr. Shansky, Dr. Stewart, Secretary Lehman, and Secretary Woodford concerning the preparation of their expert reports, including that counsel never asked the experts to change any of their opinions); *Marek v. Moore*, 171 F.R.D. 298, 300-302 (D.Kan.1997) (coun-

sel's assistance in the preparation of expert reports is proper as long as the reports reflect the testimony of the expert and are signed by the experts).

Defendants also suggest that the court should discredit the testimony of experts who lack medical training and have never practiced correctional medicine. However, a medical background is not required to opine on the cause of constitutional violations in the delivery of medical care in a correctional environment, and plaintiffs' experts' wealth of experience in managing prisons and prison systems, including experience in doing so under crowded conditions, establishes their ability to form an expert opinion on that subject. In fact, the CDCR has previously recognized the expertise of several of plaintiffs' experts. In addition to employing Secretary Woodford for twenty-seven years, culminating in her appointment as acting Secretary, Nov. 9, 2007 Woodford Report ¶ 1, the CDCR named Dr. Beard and Secretary Lehman to its Expert Panel on Adult Offender and Recidivism Reduction Programming and employed Dr. Shansky as a medical consultant for five years. Ex. P2 at ii; Rep. Tr. at 210:15-25 (Beard); Aug. 15, 2008 Lehman Report ¶ 4; Nov. 9, 2007 Shansky Report ¶ 2. As noted earlier in this opinion and order, the CDCR employed Dr. Shansky as its own medical expert during the *Plata* evidentiary hearings regarding whether a receivership was necessary. Thus, we reject defendants' suggestion that plaintiffs' experts are not qualified. To the contrary, we find their expertise far outweighs that of Dr. Thomas.

Defendants also offered mental health expert Dr. Ira Packer in support of their position in *Coleman*. Dr. Packer—who is board-certified in forensic psychology and has worked for over twenty-eight years in

correctional and forensic psychology, including as Deputy Mental Health Program Director for the Massachusetts Department of Corrections and as Assistant Commissioner for Forensic Mental Health in the Massachusetts Department of Mental Health, Dec. 10, 2007 Packer Report at 4-6—testified that, with one exception, crowding was not the primary cause of the constitutional violations with respect to mental health care. *Id.* at 23-24. The exception was that, like all of plaintiffs' experts, Dr. Packer concluded that "crowding is the primary cause of the particular difficulties in providing services to the *Coleman* class at the reception centers," *id.* at 20; that issue is therefore undisputed. As to mental health care delivery in other settings, Dr. Packer opined that "overcrowding in CDCR significantly contributes to the difficulties in providing adequate mental health services, but is not the *primary* cause of the deficiencies." *Id.* at 8 (emphasis in original). In Dr. Packer's opinion, the primary cause of the constitutionally inadequate mental health care in California's prisons is that California "now has many more acutely mentally ill individuals and at a level of more severity than had been anticipated when the prisons were built," and that the existing prison space was "not designed to meet the needs" of a mentally ill population. Rep. Tr. at 1079:11-1080:4; *see also* Dec. 10, 2007 Packer Report at 8-9.[56]

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[56] Dr. Packer also opined that difficulties with maintaining adequate medical records are a "direct effect of overcrowding, as the number of charts in the institutions is proportional to the population," Dec. 10, 2007 Packer Report at 19, and he testified that "the medical record system is a paper system, and the prison is simply not able to keep up with the amount of work and volume that's required in order to maintain an appropriate

What Dr. Packer is actually saying is that lack of planning is the cause of the overcrowding in California's prisons—but that is not the question before us. Regardless of the cause of the overcrowding, that condition is defined in terms of the capacity of the prisons, and that capacity simply is not there. Dr. Packer's testimony principally supports our conclusion that crowding is the primary cause of the constitutional violations in the delivery of mental health care. For example, Dr. Packer testified that if crowding were defined as not having enough mental health beds to serve the current population, then crowding would be the primary cause of the ongoing mental health care violations in California's prisons. Rep. Tr. at 1093:25-1094:6. Clear evidence establishes that, due to crowding, there is insufficient room in California's prisons for necessary additional mental health care beds and treatment space. Accordingly, Dr. Packer's opinion is congruent with our finding that crowding is the primary cause of the ongoing constitutional violations in *Coleman*.

Additionally, while Dr. Packer's opinion on the unanticipated nature of the influx of mentally ill prisoners into the correctional system might have had some merit at the time of the *Coleman* trial in 1993, or even at the beginning of the *Coleman* remedial phase in 1996, it is less persuasive at this late stage in the *Coleman* remedial process. The *Coleman* court has, for almost a decade, directed defendants to make adequate projections of the size of the mentally ill inmate population so that they can appropriately plan for that population's needs. The fact that it has taken defendants years to comply

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medical record system without going to an electronic process, which is not yet in place," Rep. Tr. at 1080:7-11.

with those orders does not render the increasing size of the *Coleman* class unanticipated. As we explained when we denied defendants' motion for summary judgment:

> Defendants' inability or unwillingness to tackle the problem of the increasing prison population does not support the contention that overcrowding is not the primary cause of the unconstitutional delivery of medical or mental health care. It simply helps explain why overcrowding exists and has now become a problem that may be the primary cause of the constitutional violation.

Nov. 3, 2008 Order at 9-10. In fact, the efforts defendants have made since the *Coleman* remedial process began, combined with the serious ongoing problems we have discussed in this opinion, only bolster the inescapable conclusion that crowding is the primary cause of defendants' failure to deliver constitutionally adequate mental health care in their prison system.

All of the steps defendants have taken under the *Plata* court's supervision, as well as the steps taken under the *Coleman* court's supervision, have failed to remedy the constitutional deficiencies. The crushing inmate population has strained already severely limited space resources to the breaking point, and crowding is causing an increasing demand for medical and mental health care services, a demand with which defendants are simply unable to keep pace. It also, as the expert witnesses repeatedly told us, has created numerous barriers to the delivery of constitutionally adequate medical and mental health care.

I. *Findings and Conclusions*

On the basis of the clear and convincing, indeed overwhelming and overwhelmingly persuasive, evi-

dence described above, we conclude that crowding is the primary cause of the state's unconstitutional failure to provide adequate medical and mental health care to California prisoners. Such is the opinion as well of some of the nation's foremost prison administrators, who testified that they have never previously witnessed such appalling prison conditions and that overcrowding is not only the primary cause of the constitutionally inadequate medical and mental health care in California's prisons, but also that until the problem of overcrowding is overcome it will be impossible to provide constitutionally compliant care to California's prison population. No credible evidence to the contrary was presented by defendants.

The evidence conclusively demonstrates the many ways in which crowding prevents the state from providing constitutionally adequate medical and mental health care in its prison system. Prison overcrowding has created a state of emergency in California's prisons, as the Governor has proclaimed. It forces prison administrators to devote most of their energy to addressing crises and has overwhelmed the prison system's management infrastructure. Crowding of reception centers at levels approaching 300% design capacity prevents the state from identifying the medical problems of entering inmates, and makes it impossible to provide necessary medical and mental health care to incoming inmates, who routinely remain in reception centers for more than sixty days and may serve their entire sentence there. Crowding has also left the California prison system without the space, beds, and medical, mental health, and custodial staff required to provide constitutionally adequate medical and mental health care in all parts of the prison system, and has prevented proper classification of inmates and appropriate housing according to

their needs. Furthermore, crowding has created conditions of confinement that contribute to the spread of disease, and it requires the increased use of lockdowns as a method of prison control, further impeding the prison authorities' ability to provide needed medical and mental health care. In addition, crowding has prevented the development of an adequate medical records system. The consequences of crowding are often dangerous, and on many occasions fatal. Crowding contributes to an alarming number of extreme departures from the standard of care and an unacceptably high number of inmate deaths that are preventable or possibly preventable. Likewise, crowding worsens many of the risk factors for suicide among California inmates and increases the prevalence and acuity of mental illness throughout the prison system.

The history of the individual *Plata* and *Coleman* cases further demonstrates the role of crowding in causing the constitutional violations at issue here. The extensive remedial efforts in *Plata* over the last seven years, beginning with the stipulated relief and culminating in the Receivership, have failed to bring the California prison system's medical care into constitutional compliance. Likewise, fourteen years of remedial efforts in *Coleman*, directed at every aspect of the mental health care problem, except crowding, have failed to ensure that California prisoners have access to constitutionally adequate mental health care. In fact, by 2006, the progress that had been achieved during more than a decade of remedial work in *Coleman* was being lost because of "the inexorably expanding demand for services resulting from the bulging population." Ex. D1108 at DEFS060303.

The only conclusion that can be drawn from the wealth of clear and convincing evidence before this court is that the unconstitutional denial of adequate medical and mental health care to California's inmates is caused, first and foremost, by the unprecedented crowding in California's prisons. In reaching this conclusion, we need not, and do not, conclude that crowding is the exclusive cause of those violations. We recognize that other factors contribute to California's failure to provide its inmates with constitutionally adequate medical and mental health care, and that reducing crowding in the prisons will not, without more, completely cure the constitutional violations the *Plata* and *Coleman* courts have sought to remedy. We need not find that crowding is the *only* cause, but simply that it is the *primary* one. *See supra* Sections IV, IV.H. In the end, we agree with the former Executive Director of the Texas Department of Corrections Doyle Wayne Scott, who testified that "[e]verything revolves around overcrowding," Rep. Tr. at 152:6.

In short, while other factors contribute to the unconstitutional state of the California prisons' medical and mental health care system, and while there are other steps the state must take to meet its constitutional obligations, clear and convincing evidence establishes that crowding is the primary cause of the constitutional violations, and that, therefore, this court must consider, as we do below, what actions we may order be taken to remedy that condition.

V. NO OTHER RELIEF

The Governor has proclaimed that crowding in prisons constitutes an emergency that poses a substantial risk to CDCR staff, inmates, and the general

public, and that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding." Ex. P1 at 1-2, 6. Because crowding is the primary cause of the state's inability to provide its inmates with constitutionally adequate medical and mental health care, an order requiring a reduction in prison population is the most obvious and direct method by which to bring the California prison system into constitutional compliance.

However, the PLRA makes such an order "the remedy of last resort." H.R.Rep. No. 104-21, at 25 (1995). Before entering any prisoner release order, we must find that no other relief could remedy the constitutional violations at issue here. 18 U.S.C. § 3626(a)(3)(E)(ii). In context, it is clear that "other relief" refers to any form of relief other than a prisoner release order. *See id.* § 3626(a)(3)(E) ("The three-judge court shall enter a prisoner release order only if . . . no other relief will remedy the violation of the Federal right."). In other words, we must first determine whether the unconstitutional denial of adequate medical and mental health care to California's prisoners can be remedied through an order that does not have "the purpose or effect of reducing or limiting the prison population" and that does not "direct[ ] the release from or nonadmission of prisoners to a prison." *Id.* § 3626(g)(4). The PLRA does not require that a prisoner release order, on its own, will necessarily resolve the constitutional deficiencies found to exist in *Plata* and *Coleman*. All that the PLRA requires is that a prisoner release order be a necessary part of any successful remedy. If all other potential remedies will be futile in the absence of a prisoner release order, "no other relief will remedy the violation." *Id.* § 3626(a)(3)(E)(ii).

We conclude that the constitutional deficiencies in the California prison system's medical and mental health system cannot be resolved in the absence of a prisoner release order. Clear and convincing evidence establishes that none of the available alternatives to such an order, including the continued efforts of the *Plata* Receiver and the *Coleman* Special Master, can bring the California prison system into constitutional compliance within a reasonable period of time. We agree with the numerous experts who testified that a prisoner release order is a prerequisite to providing constitutionally adequate medical and mental health care to California prisoners. Although the CDCR and the Receiver have implemented a number of remedial programs as a result of the *Plata* and *Coleman* litigation, and defendants have sought in various ways to improve the medical and mental health care provided in California's prisons, these efforts cannot succeed in the absence of a prisoner release order.

A. *Alternatives to a Prisoner Release Order*

1. *Inadequacy of Construction as a Remedy*

a. Prison Construction

In considering other alternatives to a prisoner release order, we first look to whether the state has a feasible prison construction plan that would render a prisoner release order unnecessary; if so, equity, if not law, would require that we refrain from entering that order. In a case involving overcrowding, the construction of additional prisons always provides a theoretical remedy because more prisons would necessarily reduce or eliminate overcrowding. To construe the PLRA to preclude the entry of a prisoner release order based on no more than such a theoretical remedy, however, would transform the conditions

under which the PLRA permits prisoner release orders into an absolute bar on such orders. In short, it would eliminate overcrowding as a basis for a prisoner release order, and thus prisoner release orders themselves, because the state could, in theory, always build more prisons. Thus, what we must determine is not whether building prisons *could* solve the problem, but whether prison construction offers an actual, feasible, sufficiently timely remedy for the unconstitutional state of medical and mental health care in California's prisons. Here, California has no plans to construct additional prisons in the near future and has not suggested that it does. As a result, we need not consider further the construction of additional prisons as an alternative remedy.

b. Construction of Re-entry Facilities

The next question is whether building re-entry facilities could serve to reduce prison overcrowding. The answer is that it could, if enough were constructed and if enough prisoners were transferred to them. Thus, whether the state determined to build such facilities voluntarily, or whether a court ordered or approved such construction, we would not issue the type of order plaintiffs seek if the planned construction, like any prison-related construction, offered an actual, feasible, and timely remedy that would render the relief sought here unnecessary. Defendants point to only one existing proposal that might offer such a partial remedy: construction of the additional re-entry facilities authorized by Assembly Bill 900 ("AB 900"). However, as we explain below, this construction plan does not provide a feasible alternative to the order sought here. More than two years after AB 900 was signed into law, any reduction in the crowding of California's prisons resulting

from the construction of the AB 900 re-entry facilities remains years away and would in any event likely not provide adequate relief.

In the first place, AB 900 construction has already been delayed for more than two years due to the absence of funding. At the start of trial not a single facility had been constructed under AB 900. *E.g.*, Rep. Tr. at 1679:18-23 (Cate); *id.* at 2460:25-2465:7 (Spitzer); Ex. P750 (Sept. 17, 2008 CDCR press release following legislature's failure to pass clean-up language to AB 900); Sept. 3, 2008 Hysen Dep. at 31:15-20 (state has not even reached the "preliminary-plan" stage for any in-fill or re-entry construction under AB 900). As far as we are aware, it remains the case today, eight months later, that there is no funding for AB 900 and no ground has been broken on the AB 900-authorized re-entry facilities.

Second, even if funding were secured in the near future, other practical concerns would lead to significant additional delays. Deborah Hysen, the CDCR's chief deputy secretary for facility planning and construction management, Sept. 3, 2008 Hysen Dep. at 14:11-14, explained that environmental impact reviews, which have not yet been completed for any of the proposed building sites, "could potentially hang up projects for years," *id.* at 38:8-16, 56:1-2. Delays would also result from the need to obtain necessary construction materials, *id.* at 38:17-25; permit public comment at each phase of construction, *id.* at 111:9-15; and provide for seismic retrofitting, *id.* at 112:16-21. Challenges in locating space for re-entry facilities are also likely to significantly delay or prevent full implementation of AB 900. Only one location, for 500 re-entering prisoners, has been secured, *id.* at 118:19-21, but many obstacles to construction remain, and

securing sites for other re-entry facilities is likely to prove more difficult because of community opposition. *E.g.*, Rep. Tr. at 221:11-16 (Beard); *id.* at 2750:16-2751:10 (Runner); *id.* at 2793:8-2794:3 (Meyer); Nov. 9, 2007 Woodford Report ¶ 36. Moreover, although some sites may "offer up a renovation alternative," most of the sites under consideration by the CDCR are "raw land." Sept. 3, 2008 Hysen Dep. at 120:13-15. As to the latter sites, the CDCR itself estimates that "we could be looking at several years between the time that we make this recommendation to acquire the land, and occupancy." *Id.* at 120:15-18.

Accordingly, it will be years before any re-entry facility construction pursuant to AB 900 will be completed. It is thus clear that the proposed construction of re-entry facilities cannot bring the sort of "immediate action" that the Governor has conceded is necessary to resolve the present crisis caused by prison crowding. Ex. P1 at 6. As Dr. Haney explained, prisoners in California's prisons with medical and mental health needs face "emergency-like conditions." Rep. Tr. at 945:25.

> There are people, prisoners, suffering throughout the entire prison system, mentally ill and medically ill prisoners who are not able to get the level of care they need. . . . Those things are urgent problems, and only a solution which can be brought to fruition quickly can address the kind of immediate suffering which is taking place throughout the system which I saw and other experts saw as well.

Id. at 946:1-9. Any beneficial effects of defendants' planned re-entry facility construction are simply too distant to make such construction a meaningful remedy for the emergency-like conditions in California's

prisons. Moreover, it is unlikely that the number of re-entry facilities that would be constructed would be sufficient to remedy the overcrowding problems in any event. A prisoner release order would thus be necessary as well.

Given the serious inadequacy of the state's only existing facilities construction plan, it is also clear that no other, yet-to-be-developed plan could remedy the constitutional violations here within a reasonable period of time. The evidence before the court is thus clear and convincing that the state has no feasible plan to remedy the constitutional violations at issue in *Plata* and *Coleman* through either prison construction or re-entry facility construction, and that such construction does not provide a meaningful alternative to the type of order sought by plaintiffs in this case.

c. Medical Facilities and Prison Expansion

Besides re-entry facility construction, defendants identify two additional proposals to increase the capacity of the prison system: the *Plata* Receiver's medical facility construction plan and prison expansion through the construction of space for in-fill beds, as authorized by AB 900. Rep. Tr. at 1689:10-18 (Cate). For reasons similar to those discussed above, we conclude that neither the Receiver's medical facility construction plans nor the proposed AB 900 in-fill beds—prison expansion—can remedy the constitutional violations at issue in *Plata* and *Coleman*. Like the AB 900 re-entry facilities, these proposed facilities will not be realized at any point in the near future. Furthermore, their funding is threatened by the present fiscal crisis, and the proposed construction would in any event likely fall far short of reme-

dying the problems created by the crowding of California's prisons.

As with the proposed re-entry facilities, any overcrowding relief resulting from the construction of medical facilities or the addition of in-fill bed space as a result of prison expansion is years away, at best. The *Plata* Receiver initially planned to start construction of the first site in February 2009 and to complete construction of necessary additional facilities by July 2013. Ex. D1100 at 64-65 (*Plata* Receiver's Sept. 15, 2008 Ninth Quarterly Report). To date, however, no construction has started and no funding has been secured. Likewise, as noted already, there is no available funding for AB 900, no ground has been broken on AB 900 construction, and no new beds-in-fill *or* re-entry-have been made available.

The delays are compounded by the fiscal crisis now facing the state, which makes the completion of any new construction even more distant and unlikely. The Receiver and the CDCR were until a month or so ago "negotiating a potential agreement concerning the construction of health-care-focused prison facilities" that would have provided funding for necessary healthcare construction through the California Infrastructure and Economic Development Bank (I-Bank). However, the state ultimately declined to sign the agreement. Ex. 1 to Defs.' July 1, 2009 Response to Court's June 18, 2009 Order, filed in *Coleman*, at 1. Because the fiscal crisis has required "severe and significant cuts to vital State programs," the state refused to enter into any agreement that would "require[ ] the State to seek I-Bank funding, or any other additional funding not previously appropriated by the California Legislature." *Id.* Although defendants did state that they would use a "significant"

but unspecified portion of the funds allocated by the legislature in AB 900 "to build appropriate beds for inmates with disabilities and/or other health needs," *id.* at 2, there is no indication as to when such funds will be made available; when construction might begin; or what part, if any, of the constitutional inadequacies in delivering medical and mental health care to California inmates might be remedied by such construction. Because we have received no evidence on any of these questions, we cannot conclude that the state has any actual, feasible, timely plans for such construction, which in any event would be unlikely to render a prisoner release order unnecessary.

As the state's failure to sign the agreement demonstrates, the present fiscal crisis makes any remedy that requires significant additional spending by the state chimerical—the state has said that it will not procure *any* new funds for prison hospital construction. Even if AB 900 funding were secured in the near future, however, the practical concerns described above in relation to re-entry facilities—environmental impact reviews, materials procurement, public comment, and seismic retrofitting—would lead to delays in the construction of medical facilities and prison expansion. Accordingly, like the proposed reentry facilities, neither the Receiver's constructions plan nor AB 900 prison expansion will provide inmates with relief from the emergency conditions in California's prisons in a timely fashion.

Beyond any funding and timeliness issues, we have no reason to believe that defendants' proposed expansion of prison facilities would reduce crowding significantly or lead to any improvements in the delivery of medical and mental health care to California inmates. The *Plata* Receiver has found that the in-fill

bed plan proposed by the CDCR includes allocations of clinical space that "are wildly disparate and, in many cases obviously inadequate," and that the CDCR's plan "ignor[es] the real life differences in clinical requirement[s] based on the characteristics of the patient population, security level and escort officers requirements, the need for clinical privacy, equipment requirements, and other critical factors." Ex. D1092 at 37 (*Plata* Receiver's May 15, 2007 Report Re: Overcrowding). On a more fundamental level, the AB 900 in-fill construction plan "essentially is a prison expansion measure which increases the number of prison cells without addressing the fundamental structural issues that have caused the crisis and that have created unconstitutional conditions within the prisons." Nov. 9, 2007 Woodford Report ¶ 31. According to Secretary Woodford:

> [t]he so-called "in-fill" beds will cause more problems than they will solve. Many of California's prisons are so big that they are effectively unmanageable. Wardens and other administrators spend much of their time responding to crises, rather than fulfilling their responsibilities to provide adequate medical and mental health care. Unless these in-fill beds stand alone with their own administrative and suport facilities, adding thousands of additional prisoners to already overburdened facilities will only compound the burdens imposed on prison administrators and line staff.

Id. ¶ 39. Similarly, Director Scott explained that, because the in-fill bed numbers in defendants' construction plan are based on "housing overcrowding capacity" rather than "design build capacity,"

> [p]risoners in the new facilities . . . might not initially be living in gymnasiums or hallways, as they are now, but they will still be overcrowded. California will be in the same position with the new beds as with the old, replicating the same conditions that led to inadequate staffing and treatment space, inadequate out-of-cell time, and overworked and overstressed staff and violent, frustrated prisoners.

Aug. 13, 2008 Scott Supp. Report ¶ 17. Thus, while the construction of in-fill beds would reduce the use of "bad beds," the principal effects of the overcrowding in California's prisons would remain unaddressed.

d. Construction as a Means of Compliance

Given all of the above problems, we are convinced that neither prison expansion, nor re-entry or medical facilities construction, nor any other construction effort offers a meaningful and timely remedy for the constitutional deficiencies in the delivery of prison medical and mental health care caused by crowding. Although it might be theoretically possible for California to build its way out of its prison overcrowding problem, it is not practical to anticipate that the state will do so in a timely manner, if ever, given "the time that it takes and . . . the huge costs that it takes to do things like this." Rep. Tr. at 254:25-255:12 (Beard). Dr. Beard concluded that although construction "should be part of a plan, if you try to rely on that alone, you are probably never going to get there, because they haven't been able to get there over the last 20 years." *Id.* at 256:4-8; *see also, e.g., id.* at 219:11-25 (Beard).

Nonetheless, because our order requires defendants to reduce the prison population to a specified

percentage of the prison system's design capacity, any additional capacity provided by completed construction could help the state meets its obligations and might allow it to increase the number of prisoners who could constitutionally be housed in the prison system. In such case an adjustment as to the specific terms of the population reduction order, although not to the percentage cap itself, might conceivably be appropriate.[57] We see little prospect for such an occurrence, however, in the reasonably near future, and thus no prospect of remedying the constitutional violations in a timely manner, other than in accordance with the order we issue below.

2. *Inadequacy of Additional Hiring*

Defendants do not suggest that the constitutional deficiencies in the CDCR's system of medical and mental health care could be remedied by hiring additional medical, mental health, and custodial staff. This is not surprising, given the serious and ongoing difficulty in filling vacant positions encountered in both the *Plata* and *Coleman* remedial proceedings. *See supra* Sections II.A.5, II.B.2.c. Furthermore, as noted already, crowding itself seriously impedes the recruitment and retention of medical and mental health care staff. The working conditions for such personnel in California's overcrowded prisons are uninviting, and many potential staff members are unwilling to work under them. *See, e.g.*, Nov. 9, 2007 Stewart Report ¶ 41; Nov. 9, 2007 Shansky Report ¶ 23. Even if staff could be hired, they would have

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[57] Likewise, should for some reason the design capacity of California's adult prison institutions *decrease*, the CDCR would be required to reduce the absolute population of its adult prison institutions by a greater number.

almost nowhere to work because CDCR's facilities lack the physical space required to provide medical and mental health care. *See, e.g.*, Rep. Tr. at 272:1-13 (Lehman); *id.* at 501:3-7 (Shansky). Thus, the evidence is clear and convincing that hiring additional staff could not bring the CDCR's medical and mental health care into constitutional compliance in the absence of a reduction in prison crowding.

3. *Insufficiency of the Plata Receivership and Coleman Special Mastership*

We next consider whether the existing remedial efforts of the *Plata* and *Coleman* courts provide an alternative form of relief that could remedy the constitutional violations at issue in *Plata* and *Coleman*. Defendants argue that the delivery of medical and mental health care has improved and continues to improve under the direction of the *Plata* Receiver and the oversight of the *Coleman* Special Master. However, the *Plata* and *Coleman* courts are barred by the PLRA from ordering any remedy that involves a reduction in the prison population, 18 U.S.C. § 3626(a)(3)(B), and the *Plata* Receiver and *Coleman* Special Master therefore lack the most direct and effective means of eliminating the fundamental problems that result from overcrowding, *see supra* Section IV. While improvements have been and continue to be made, and the *Plata* and *Coleman* courts have continued their efforts during this three-judge court proceeding, it is clear that the Receiver and the Special Master cannot remedy the constitutional violations in the absence of a prisoner release order.

The *Plata* Receiver has determined that adequate care cannot be provided for the current number of inmates at existing prisons and that additional capacity is required to remedy the medical care deficiencies

that exist in California's prison system. *See, e.g.*, Ex. D1133 at 27-28 (*Plata* Receiver's June 6, 2008 Turnaround Plan of Action). Defendants correctly note that the *Plata* Receiver has stated that "[f]ailure is not an option" and that "[o]ver time the CDCR's medical delivery system will be raised to constitutional levels." Ex. D 1092 at 41 (*Plata* Receiver's May 15, 2007 Report Re: Overcrowding). However, the Receiver also noted that "the time this process will take, and the cost and the scope of intrusion by the Federal Court cannot help but increase, and increase in a very significant manner, if the scope and characteristics of CDCR overcrowding continue." *Id.* According to the Receiver, the creation of a system that could adequately deliver medical care to all of the inmates moving through the reception center at the California Institution for Men under the present level of overcrowding could "all but bankrupt the State of California and create a medical delivery problem in [surrounding] counties because there may not be enough competent clinicians to provide medical care for an unlimited number of State prisoners and for the public also." *Id.* Even assuming that the Receiver's comments are somewhat overstated, relying on the authority that he possesses to resolve the medical care crisis in the absence of a population reduction order does not offer a feasible alternative. There is no question that in the absence of a population reduction order a fair number of new prisons and medical facilities would be required. We have already explained that such construction could not be completed in a timely manner, even if the legislature were willing to fund it.

The history of the *Coleman* case demonstrates even more starkly the impossibility of establishing a constitutionally adequate mental health care delivery

system at current levels of crowding. For almost a decade the *Coleman* court has issued specific orders directing defendants to develop sufficient beds for the delivery of mental health care at each level of the mental health care delivery system. Despite all of those orders, defendants have far too few mental health care beds to meet present demand. The CDCR's recent refusal to sign the agreement it negotiated with the Receiver makes compliance even more unlikely, as the state had previously offered the agreement as its primary method of developing the needed mental health beds. Likewise, the *Coleman* court has issued numerous orders directing defendants to decrease the time required to transfer seriously mentally ill inmates, including those who are suicidal or otherwise in crisis, to appropriate levels of supervised care, but wait lists remain at every level. These are but two examples of the *Coleman* court's ongoing inability, despite tremendous effort, to bring the prison mental health care system into constitutional compliance. In light of this history, the evidence is clear and convincing that defendants are simply unable to meet the escalating demand for resources caused by the overcrowding in California's prisons.

Defendants argue that a prisoner release order will not fix the constitutional violations in the delivery of mental health care because they will need to develop appropriate treatment space and hire sufficient staff even if the total inmate population is reduced. Defendants point to the *Coleman* Special Master's findings that "[e]ven the release of 100,000 inmates would likely leave the defendants with a largely unmitigated need to provide intensive mental health services to program populations that would remain undiminished by a reduction of some 19,000

[CCCMS] inmates," and that the release of 50,000 inmates "would probably not raise staffing resources into equilibrium with the mental health caseload." Ex. D1292 at 15.

We agree with the Special Master that the population reduction order sought by plaintiffs is not by itself a panacea, and that defendants' efforts to provide constitutionally adequate mental health care must go beyond reducing prison overcrowding. Obviously, simply creating additional space would not solve the problem; prison authorities would be required to ensure that the space is used to provide prisoners with professionally sound medical and mental health treatment, to administer necessary medications to prisoners, and to remove the other barriers to constitutionally adequate medical and mental health care created by overcrowding. However, the defendants cannot remedy the ongoing constitutional violations without significant relief from the overcrowded conditions. We find the Special Master's statement about 100,000 inmates somewhat hyperbolic. The comment about 50,000 inmates more nearly approximates the remedy we deem appropriate given our obligation to adopt the least intrusive remedy. Nevertheless, as he and we have both noted, additional steps will be required after the prison population is reduced. We believe that the Special Master will be able to provide significant assistance to the state in that respect.

It is apparent from the extraordinary efforts undertaken by the Special Master and the Receiver, as well as the fundamental constitutional inadequacies in medical and mental health care, that a reduction in the present crowding of the California prisons is necessary if the efforts of the *Plata* Receiver and the

Coleman Special Master to bring the medical and mental health care in California's prisons into constitutional compliance are ever to succeed. In the absence of a prisoner release order, all other remedial efforts will inevitably fail.

4. *Other Proposals*

As noted in our discussion of prison construction, equitable concerns would prevent us from entering a prisoner release order if the state had plans in place that would reduce the crowding of California's prisons sufficiently to allow the remedying of the constitutional violations in the near future. However, the evidence at trial was clear and convincing that none of the state's existing plans can reduce the prisoner population to the extent necessary to permit the CDCR to bring its prison medical and mental health systems into constitutional compliance.

The state and one of the defendant-intervenors have suggested two different means of reducing the prison population. The first is already being implemented by the state through its program to transfer California inmates to facilities in other states. *E.g.*, Kernan Trial Aff. ¶¶ 16-17.[58] We do not comment on

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[58] Defendants' out-of-state transfer program, if ordered by the court, would fall within the PLRA's definition of a prisoner release order, because it "directs the release [of inmates] from . . . *a* prison," 18 U.S.C. § 3626(g)(4) (emphasis added). An order requiring the transfer of prisoners from California's adult prison institutions to out-of-state prisons would be functionally identical to an order requiring the transfer of prisoners from a single prison or jail to other institutions, and an order of that type has been held to be a prisoner release order, notwithstanding that the state, county, or city could move the affected prisoners into other institutions rather than releasing them from incarceration. *See Tyler*, 135 F.3d at 595-98 (finding that injunction limiting the number of technical probation violators that could

the merits of this program, although we have doubts about its efficacy as applied to the mentally ill and question its possible adverse effect on prisoners moved to a location far removed from their families and friends. Still, as of August 29, 2008, approximately 4852 California inmates had been housed in out-of-state institutions, and the CDCR had plans to transfer up to a total of 3000 additional inmates to such sites. Cate Trial Aff. ¶ 47.

Given the severely overcrowded conditions we have already described, this planned additional reduction of 3,000 prisoners in the in-state inmate population is too small to significantly affect the provision of medical and mental health care to California's inmates.[59] Not surprisingly, defendants do not suggest that the transfer of even more additional inmates to out-of-state facilities would provide a meaningful alternative to the population reduction order proposed by plaintiffs. Furthermore, despite the small size of the existing transfer program, the need to monitor out-of-state facilities to ensure that all California inmates are receiving constitutionally adequate medical care has already hampered the in-state remedial process. Ex. D1100 at 48-49 (*Plata* Receiver's Sept. 15, 2008 Ninth Quarterly Report) (discussing on-site investi-

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be housed in the city jail, thereby forcing the city to pay for their confinement elsewhere, was a prisoner release order under the PLRA).

[59] Defendants stated that "CDCR will also seek authorization to transfer [additional] inmates out-of-state, if necessary," Cate Trial Aff. ¶ 47, but there is no evidence regarding how difficult this authorization is to obtain; how long the authorization process or transfer process takes; what the cost of such a transfer would be; or how many additional inmates could realistically be dispatched to out-of-state facilities.

gation and corresponding corrective action plan following the death of a California inmate being housed at a private prison in Mississippi). As the Receiver noted, out-of-state monitoring

> has had a serious negative impact on the Office of the Receiver, drawing critical clinical personnel away from other important projects and delaying "in-state" remedial efforts. In essence, thousands of dollars of valuable clinical hours have been devoted to helping a private prison organization rework its medical delivery system (at the request of CDCR and State officials) in order to keep the out of state transfer process from collapsing.

Id. at 49.

Based on this clear and convincing evidence regarding the operation of the existing out-of-state transfer program, we conclude that the transfer of inmates to out-of-state facilities would not on its own begin to provide an adequate remedy for the constitutional deficiencies in the medical and mental health care provided to California's inmates. Moreover, given the need to ensure constitutionally adequate medical and mental health care in states as distant as Mississippi, the program may be of questionable efficacy, given the comparatively small number of prisoners who might be included.

A defendant-intervenor has suggested that the prison population might be reduced by transferring inmates who do not have legal status in the United States to federal custody. Runner Trial Decl. ¶ 19. However, the intervenor introduced no evidence suggesting that this transfer program could soon be implemented, that the federal government would

agree to such an arrangement, or that any implementation of this program would result in a population reduction sizable enough to allow the CDCR to remedy the constitutional violations in *Plata* and *Coleman*.[60] The program is thus too speculative to suggest that we should abstain from entering the type of prisoner release order set forth below.

B. *Expert Testimony*

The testimony we received from the experts overwhelmingly rejected the claim that alternatives such as construction of prisons or other facilities or the transfer of small numbers of prisoners could render a prisoner release order unnecessary. Director Scott succinctly and persuasively summarized the testimony of the experts in stating that "unless the population is [substantially] reduced, the state will remain in crisis verging on catastrophe and will remain utterly unable to provide adequate medical and mental health care to the prisoners in its custody." Nov. 9, 2007 Scott Report ¶ 6; *see also id.* ¶ 3 ("[W]ithout substantially reducing its prisoner population, California will never be able to generate the custodial support services necessary to provide prisoners with basic medical and mental health care."). Secretary Woodford, the former head of the CDCR who also served as warden at San Quentin State Prison, Nov. 9, 2007 Woodford Report ¶ 1, similarly testified that, "[u]ntil the population is reduced substantially there is no realistic hope that the unconstitutional conditions will be eliminated," *id.* ¶ 46; *see also id.* ¶ 6 ("[N]othing short of a reduction in the prison population will effectively address these issues."). Woodford explained that, in her experience

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[60] *See infra* note 82.

as a manager of both an individual institution and the entire department:

> [W]e would come up with wonderful ideas and have great planning, but overcrowding interfered with our ability to implement any of those ideas, to bring resolution to any of the problems that we're facing in both [*Plata* and *Coleman*]. And the overcrowding was every day, more and more inmates coming into the system.

Rep. Tr. at 376:3-15. Thus, according to Woodford, "without addressing the issue of overcrowding, the Department of Corrections will never be able to provide appropriate medical or mental healthcare and . . . sustain any kind of quality constitutionally-adequate medical or mental healthcare." *Id.* at 385:6-10.

Other experts also agreed with Secretary Woodford's and Director Scott's opinions. For example, Dr. Beard opined that, while he believes CDCR staff and leadership generally "want to do the right thing," he does not believe they are capable of providing constitutionally adequate care under the current crowded conditions. *Id.* at 251:12-23, 259:5-12. Similarly, Secretary Lehman testified that "you cannot provide adequate healthcare and mental healthcare under the current situation of crowding within the State of California," *id.* at 271:22-25, and that "a reduction in the population is a necessary condition" for providing such care. Aug. 15, 2008 Lehman Report ¶ 11. And Dr. Shansky testified that:

> The CDCR, in concert with the Receiver, cannot simultaneously develop a competent medical care delivery system in facilities that lack necessary space and staffing, and address the growing needs of an ever-increasing number of patients. Until

> the existing overcrowding situation is addressed, CDCR is locked into a "crisis-response" approach where it can focus only on putting out "fires" rather than system-building.

Nov. 9, 2007 Shansky Report ¶ 138. "The limitations on the CDCR, including staffing, administrative resources and especially treatment space, are so severe that the only avenue for building a constitutional health care delivery system is to reduce the demand on the system by lowering the number of patients it serves." Sept. 10, 2008 Shansky 2d Supp. Report ¶ 8. One of defendant-intervenors' experts agreed that "the necessary constitutional medical and mental health services can't be provided with today's overcrowding." Rep. Tr. at 2202:4-6 (Bennett).

The mental health experts who testified also agreed that a reduction in crowding is a prerequisite to providing constitutionally adequate care. Dr. Stewart testified that, "due to the extreme nature of the overcrowding, which negatively impacts all aspects of the mental health and medical care system that is currently causing *Coleman* class members needless suffering, as well as death, . . . the only remedy that would help the system move into constitutional compliance" is reducing the population. *Id.* at 2207:22-2208:2. Dr. Stewart based his conclusion on "the persistence of the [Eighth Amendment] violations [in *Coleman*] after years of very close court monitoring," and on statements by the *Coleman* Special Master "in several places that the progress that was made early on in the *Coleman* matter has been undermined by current population pressures that exist." *Id.* at 2208:12-19. Dr. Stewart testified that defendants' plans to remedy the persistent problems that pose barriers to constitutional compliance are inadequate

mainly because the plans "will take years to implement, if they are even able to be implemented at all, given the current degree of the population pressures." *Id.* at 2208:21-2209:4.

Dr. Haney also concluded that the only remedy for the ongoing Eighth Amendment violations in the delivery of mental health and medical care is a substantial reduction of the CDCR inmate population, Aug. 15, 2008 Haney Report ¶¶ 364-378; Rep. Tr. at 945:14-19, and provided several reasons for his conclusion. The first was "the urgency of the problem itself, and the unacceptably time-consuming nature of alternative solutions." Aug. 15, 2008 Haney Report ¶ 367. As Dr. Haney testified, mentally ill inmates suffering in the "emergency-like conditions" of California's prisons cannot await relief for an additional four or five years, the time projected by defendants' best-case scenario for the construction of additional mental health facilities. Rep. Tr. at 945:22-946:16; *see also* Aug. 15, 2008 Haney Report ¶ 367. Dr. Haney also identified other problems with the proposed construction plans: They are insufficient, by themselves, to address the range of mental health care delivery problems caused by crowding; do not take into account the conditions in which CCCMS inmates are housed; do not provide sufficient EOP space; and do not "realistically address" the "massive" staffing increases that will be required. Rep. Tr. at 947:16-948:14. Finally, Dr. Haney opined that, for the past twenty-eight years, the CDCR has taken the same basic approach to overcrowding and its impacts on mental health and medical care and, while conditions have occasionally improved over that period, "the system has gotten worse not better." *Id.* at 948:18-949:8. Delivery of services is now so stressed by the "overwhelming press of the numbers in the system" that

the CDCR's method of addressing it "has finally run its course, and it is time . . . to address the issue at its cause, and the cause of it is overcrowding." *Id.* at 949:13-17 (Haney).

Defendants emphasize testimony that it is possible to provide constitutionally adequate care in a crowded prison system. *E.g.*, Rep. Tr. at 286:15-18 (Lehman) (testifying that it is possible to provide adequate care "at some level" of overcrowding); *id.* at 1216:21-1217:3 (Thomas) (testifying that such care can be provided in "extremely overcrowded conditions"); Nov. 9, 2007 Thomas Report ¶ 6 (same); Rep. Tr. at 1080:12-24 (Packer) (testifying that, "although overcrowding exacerbates the problems" in providing appropriate mental health care, such care can be provided "if appropriate facilities and programs are developed"). Although for the reasons previously stated we are skeptical of Dr. Thomas's testimony, we credit the remaining testimony to the extent that it states that the inmate population need not be reduced to 100% design capacity before constitutional levels of care can be provided. We find, however, that California's prison system is now so overcrowded that it is impossible to provide adequate care without a substantial reduction in crowding. As Secretary Lehman persuasively explained, no state "has experienced anything close" to the level of crowding in California—a level that makes it impossible to provide constitutionally adequate medical and mental health care. *Id.* at 286:19-287:1; *see also id.* at 297:1-17 (Haney) (testifying that California has been operating at 190% design capacity, which is "an unheard of amount of overcrowding"); Nov. 9, 2007 Scott Report ¶ 3 (overcrowding crisis in California is "unprecedented in scope"). Moreover, Dr. Packer's opinion that constitutionally adequate mental health care can be

provided in an overcrowded prison setting is significantly qualified by his testimony that the provision of constitutionally adequate care in such settings is contingent upon the development of "appropriate facilities," and that simply retrofitting prison space that was not originally designed for delivery of mental health care is unlikely to lead to "a program that is sufficient." *See* Rep. Tr. at 1080:18-1082:12.

Additionally, although defendants' two experts testified that adequate care can be provided in overcrowded settings and that they themselves have been able to do so, the systems in which they worked had prison population controls in place. Dr. Packer testified that he was able to provide appropriate mental health care in the overcrowded Massachusetts jail facilities he supervised. *Id.* at 1086:6-12. However, he admitted that "there was some effort on the part of the courts to not send in some of the mentally ill inmates into the system. And, frankly, in my opinion the most effective procedure we had was that we provided mental health services at the courts, and we diverted mentally ill people away from the jail." *Id.* at 1086:17-23. Thus, he explicitly opined that the diversion of mentally ill prisoners—a remedy falling within the PLRA's definition of a prisoner release order—would be the most effective interim remedy. *Id.* at 1086:25-1087:14; *cf. id.* at 1084:17-18 (testifying that new construction is required to get the level of mental health care "to the level that really needs to be"). Similarly, during the time in which Dr. Thomas served as a physician with the Florida Department of Corrections, the department operated under statutory population controls that capped the population at prison hospitals and infirmaries at 100% design capacity and the general prison population at 150% design capacity. *Id.* at 1250:1-1251:1. Consequently,

in light of the overwhelming expert testimony to the contrary, we do not find persuasive the testimony by either Dr. Packer or Dr. Thomas that constitutional levels of medical and mental health care can be established in California's prisons without first reducing the California prisoner population to well below 190% design capacity.

C. *Findings and Conclusions*

The evidence establishes that "[r]educing the population in the system to a manageable level is the only way to create an environment in which other reform efforts, including strengthening medical management, hiring additional medical and custody staffing, and improving medical records and tracking systems, can take root in the foreseeable future." Sept. 10, 2008 Shansky 2d Supp. Report ¶ 10. Other forms of relief are either unrealistic or depend upon a reduction in prison overcrowding for their success. Accordingly, we find, by clear and convincing evidence, that no relief other than a prisoner release order is capable of remedying the constitutional deficiencies at the heart of these two cases.

VI. NARROWLY DRAWN, LEAST INTRUSIVE REMEDY THAT EXTENDS NO FURTHER THAN NECESSARY

Plaintiffs have demonstrated that crowding is the primary cause of the unconstitutional denial of medical and mental health care to California prisoners, and that no relief other than a prisoner release order can remedy those constitutional violations. Accordingly, plaintiffs have met the PLRA's requirements for the entry of a prisoner release order. *See* 18 U.S.C. §§ 3626(a)(3)(E)(i), (ii). However, any relief this court orders must also meet the PLRA's general

standard for prospective relief. Specifically, the relief must be "narrowly drawn, extend[ ] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." *Id.* § 3626(a)(1)(A). Plaintiffs seek an order requiring the state to reduce the population of its adult institutions to 130% of their combined design capacity. We find that the scope and form of the relief proposed by plaintiffs comports with the PLRA. Although we believe that plaintiffs' request for a cap of 130% is reasonable and finds considerable support in the record, there is some evidence that a reduction in the population to a level somewhat higher than 130% of the system's design capacity but lower than 145% might provide the relief from overcrowding necessary for the state to correct the constitutional violations at issue. Notwithstanding the weight of the evidence, we cannot say with certainty that a cap as low as 130% is necessary, although we are persuaded that the cap must not be much higher. Because any relief we order must extend no further than necessary, and because we are convinced that a cap of no higher than 137.5% is necessary, we order defendants to reduce the prisoner population to 137.5% of the adult institutions' total design capacity.[61]

A. *Scope of Relief*

Our remedy "must of course be limited to the inadequac[ies] that produced the injur[ies] in fact that the plaintiff[s] ha[ve] established." *Lewis*, 518

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[61] As noted already, our opinion and order is limited to the CDCR's thirty-three adult prison institutions and does not include camps, community correction centers, or Department of Mental Health state hospitals.

U.S. at 357. In this proceeding, those injuries involve the state's longstanding and knowing failure to provide its prisoners with the minimal level of medical and mental health care required by the Constitution. The *Plata* court found that "the California prison medical system is broken beyond repair"; that the "future injury and death" of California prisoners is "virtually guaranteed in the absence of drastic action"; and that the state had failed to address those problems despite having "every reasonable opportunity" to do so. Oct. 3, 2005 FF & CL in *Plata*, 2005 WL 2932253, at * 1. Likewise, the *Coleman* court found that the state was deliberately indifferent to the fact that

> seriously mentally ill inmates in the California Department of Corrections daily face an objectively intolerable risk of harm as a result of the gross systemic deficiencies that obtain throughout the Department. . . . [I]nmates have in fact suffered significant harm as a result of those deficiencies; seriously mentally ill inmates have languished for months, or even years, without access to necessary care. They suffer from severe hallucinations, they decompensate into catatonic states, and they suffer the other sequela to untreated mental disease.

Coleman, 912 F.Supp. at 1316, 1319.

With the identified constitutional violations in mind, we first consider the propriety of plaintiffs' request for a systemwide cap. "'The scope of injunctive relief is dictated by the extent of the violation established.' The key question . . . is whether the inadequacy complained of is in fact 'widespread enough to justify system wide relief.' " *Armstrong*, 275 F.3d at 870 (quoting *Lewis*, 518 U.S. at 359). In other words, a systemwide remedy like that requested by plaintiffs

is appropriate only if plaintiffs have established systemwide injury and impact. *See, e.g.*, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 463-65 (1979); *Armstrong*, 275 F.3d at 871; *Smith v. Ark. Dep't. of Corr.*, 103 F.3d 637, 645-46 (8th Cir.1996). "[I]solated violations affecting a narrow range of plaintiffs" cannot support systemwide relief. *Armstrong*, 275 F.3d at 870; *see also Lewis*, 518 U.S. at 359 (finding systemwide relief inappropriate where plaintiffs had shown only two violations).

There can be no serious dispute that a systemwide remedy is appropriate in this case. As we have already noted, the constitutional violations identified by the *Plata* and *Coleman* courts exist throughout the California prison system and are the result of systemic failures in the California prison system. *See* Nov. 3, 2008 Order at 7. Numerous reports issued by the *Plata* Receiver and the *Coleman* Special Master document the systemic nature of those problems. Not surprisingly, defendants have never contended that the problems at issue in *Plata* and *Coleman* are institution-specific. Accordingly, a systemwide remedy is appropriate.

Similarly, we conclude that a single systemwide cap rather than a series of institution-specific caps or a combination of systemwide and institution-specific caps is appropriate. Although institution-specific caps would be tailored to each institution's needs and limitations, an institution-by-institution approach to population reduction would interfere with the state's management of its prisons more than a single systemwide cap, which permits the state to continue determining the proper population of individual institutions. Unless and until it is demonstrated that

a single systemwide cap provides inadequate relief, we will limit the relief we order to that form of order.

To be certain, the relief sought by plaintiffs extends further than the identified constitutional violations in one regard: Any population reduction plan developed by the state is likely to affect inmates without medical conditions or serious mental illness. However, there is no feasible prisoner release order that would reduce overcrowding without affecting some inmates outside the *Plata* and *Coleman* classes. Thus, we have no doubt that the relief we order contravenes no principle of law or equity in that regard.

Accordingly, the systemwide scope of plaintiffs' requested relief is properly tailored to the identified constitutional violations, at least at this first stage of the court's attempt to bring the system into compliance with the Constitution's mandate.

B. *Form of Relief*

We next consider the form of relief proposed by plaintiffs. Plaintiffs seek an order requiring the state to reduce its prison population to a specified percentage of the system's design capacity within two years. Initially, the state would be required to develop a plan to reduce the population to the designated percentage. After considering the proposed plan and any objections from plaintiffs or intervenors, we would enter a final order incorporating the state's proposal if it is feasible, with any appropriate modifications or amendments we may deem necessary. We would then retain jurisdiction to ensure compliance with the order or make further changes as necessary in order to allow the state to attain the actual reduction in the prison population set forth in our order within the specified time.

The Supreme Court described the nearly identical procedure used in *Bounds v. Smith*, 430 U.S. 817 (1977), as an "exemplar of what should be done" in crafting systemwide prospective relief. *Lewis*, 518 U.S. at 363. In *Bounds*, the district court found that the state's failure to provide legal research facilities unconstitutionally denied its inmates access to the courts. *Bounds*, 430 U.S. at 818. However,

> [r]ather than attempting to dictate precisely what course the State should follow [to remedy the constitutional violation], the court charged the Department of Correction with the task of devising a Constitutionally sound program to assure inmates access to the courts. It left to the State the choice of what alternative would most easily and economically fulfill this duty.

Id. at 818-19 (internal quotations omitted). "The State responded with a proposal, which the District Court ultimately approved with minor changes, after considering objections raised by the inmates." *Lewis*, 518 U.S. at 362-63 (citing *Bounds*, 430 U.S. at 819-20).

In both *Bounds* and *Lewis*, the Supreme Court praised the *Bounds* lower court's remedial approach, finding that it "scrupulously respected the limits on [the court's] role" and preserved the prison administrators' "wide discretion within the bounds of constitutional requirements." *Bounds*, 430 U.S. at 832-33; *Lewis*, 518 U.S. at 363. The relief requested by plaintiffs here demonstrates the same respect for this court's limited role and for the need to preserve the state's "wide discretion" in managing its prisons. As in *Bounds*, plaintiffs' proposal would permit the state to develop the necessary population reduction plan in the first instance. As we describe *infra*, the state would not be required to throw open the doors of its

prisons, but could instead choose among many different options or combinations of options for reducing the prison population. The state's options include, *inter alia*, the following: enhancing good time and program participation credits; diverting technical parole violators and certain offenders with short sentences; reducing the length of parole supervision; implementing evidence-based rehabilitative programming; or implementing sentencing reforms, perhaps by means of a sentencing commission or by otherwise changing outmoded or counterproductive sentencing practices. Many of these options have already been proposed at various times by defendants themselves. *See, e.g.*, Rep. Tr. at 1694:19-1699:15 (Cate) (discussing Governor Schwarzenegger's proposed reforms, including the elimination of parole supervision and enhanced good time and program participation credits); *see also* Ex. P3 at 77 (noting that fifteen reports presented to the state between 1990 and 2007, some of which were prepared by state-established commissions or committees, recommended sentencing reform and the establishment of a sentencing commission).

Plaintiffs' proposed order would permit the state to choose among many available means of achieving the prescribed population reduction, thereby maximizing the state's flexibility and permitting the state to comply with the cap in a manner that best accords with the state's penal priorities. For this reason, an order requiring a systemwide population reduction to a specified percentage is preferable to an order or series of orders requiring particular methods of population reduction, such as the reform of the parole system or the overhaul of the state's sentencing policies. By asking the state to develop a remedial plan in the first instance, the relief sought by plaintiffs

exhibits the deference to state expertise required by the PLRA and *Lewis* and limits this court's intrusion into "'the minutiae of prison operations.'" *Lewis*, 518 U.S. at 362 (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)). The population reduction order sought by plaintiffs is thus "the least intrusive means necessary to correct the [constitutional] violation[s]" at issue in this proceeding. 18 U.S.C. § 3626(a)(1)(A).[62]

C. *The Required Population Reduction*

Finally, we consider plaintiffs' specific request that we order defendants to reduce California's prisoner population to 130% of the system's design capacity. At the outset, we note that choosing the percentage of design capacity to which the prison population should be reduced is "not an exact science." Rep. Tr. at 976:3-4 (Haney). As plaintiffs' expert Dr. Craig Haney explained, "there's nothing magical" about any specific percentage, including 100%, *id.* at 976:7-8, but the likelihood of bringing the system into constitutional compliance increases as the prison population nears 100% design capacity, *id.* at 976:8-15. Our task is further complicated by the fact that defendants have not presented any evidence or arguments suggesting that we should adopt a percentage other than 130% design capacity. Nonetheless, both the PLRA and

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[62] Of course, *Bounds* involved the initial remedial response to a recently identified constitutional violation, whereas *Plata* and *Coleman* have been in their remedial phases for a number of years. We do not believe this distinction would justify a departure from the remedial model praised in *Bounds* and *Lewis*, in which the state is given the first opportunity to develop a remedial plan. It may, however, along with the nature of the constitutional violations and of plaintiffs' injuries, affect the length of time in which the state is required to develop and implement the plan.

general equitable principles require this court to ensure that the population reduction sought by plaintiffs extends no further than necessary to rectify the unconstitutional denial of medical and mental health care to California's prisoners.

Although plaintiffs seek a cap at 130% design capacity, the evidence at trial demonstrated that even a prison system operating at or near only 100% design capacity faces serious difficulties in providing inmates with constitutionally sufficient medical and mental health care. First, California's prisons were not designed to provide medical and mental health care for the numbers now housed therein. Instead, the physical space for health care in California's prisons was devised on the assumption that the prisons' populations would not exceed 100% of their design capacity. Rep. Tr. at 271:8-10 (Lehman) ("The physical space provided [in each institution] is based on the hundred percent population as opposed to 200 percent."). As defendants' witness Robin Dezember noted, the state's prisons "were not designed and made no provision for any expansion of medical care space beyond the initial 100% of capacity," and "none of the 19 CDCR institutions planned and built in the boom of the 80s and 90s gave any thought to the space that might be needed for mental health purposes." Dezember Trial Aff. ¶ 72 (internal quotations omitted). Shockingly, this failure to account for the effect of overcrowding on the ability of prisons to deliver medical and mental health continued even after the state knew that they would be filled to 200% of their design capacity. Ex. D1092 at 21-22 (*Plata* Receiver's May 15, 2007 Report Re: Overcrowding) (noting that a new prison built in 2005 was designed to provide medical care for a population equal to 100% design capacity notwithstanding the CDCR's

existing plan to house a population equal to 200% design capacity in the new prison).

The mismatch between the physical design of the prisons and their present overcrowding accounts for many of the space-related obstacles to the provision of constitutionally sufficient medical and mental health care. According to Secretary Lehman, the former head of corrections in Washington, Maine, and Pennsylvania, this mismatch leaves California's prisons without the physical space to provide medical and mental health care to the number of prisoners now housed in those overcrowded institutions. In the absence of sufficient space the prisons are "simply not able to provide the [healthcare] services that [are] required." Rep. Tr. at 271:10-11.

More generally, any prison operating at 100% design capacity stretches the limits of its physical design. According to Dr. Haney, "prisons were virtually always designed sparsely . . . so that a prison that was reaching 100% of its capacity really was pushing against the limits of the number of prisoners that it could safely and humanely hold." Aug. 15, 2008 Haney Report ¶ 380. This is especially true in the context of space allocated for purposes other than housing, including medical and mental health care. "[P]rison design traditionally maximized housing capacities and minimized space allocated to programming needs, opportunities, and demands." *Id.* As a result, "[w]hen a prison beg[ins] to operate at or near its [design] capacity, there [is] typically little or no space available to pursue all but the most basic programming options." *Id.*

Finally, numerous witnesses testified that a prison system must operate *below* 100% design capacity to function properly. Secretary Woodford, former head

of CDCR and warden at San Quentin, stated that a five percent vacancy rate is necessary "[t]o manage the movement of prisoners appropriately." Nov. 9, 2007 Woodford Report ¶ 14. "Without the flexibility that this vacancy rate provides, it is very difficult to ensure that prisoners are housed appropriately for their medical and mental health needs." *Id.* In addition, three witnesses for the defendant-intervenors testified that jails require a vacancy rate of at least five or ten percent to operate properly. According to San Mateo County Sheriff Gregory Munks, jails operate properly only when at or below their "functional capacity," which is five to ten percent lower than their design capacity. *See* Rep. Tr. at 1776:15-20 (Munks); *see also id.* at 1776:20-23 (functional capacity "takes account [of] having the room for classification, being able to move inmates around, [and] keep[ing] them separated based on classification, based on needs, based on gang affiliation"). Lieutenant Stephen Smith of the Los Angeles County Sheriff's Department testified that jails cannot operate safely or properly if every bed is filled, and that he would expect the same result in prisons. *Id.* at 1837:5-1838:6 (Smith). According to Lieutenant Smith, "A hundred percent of your capacity is really a misnomer. . . . [Y]ou're at a hundred percent capacity when you are at 90 percent. You need a ten percent vacancy factor to just facilitate movement, and those type of issues because of the margins." *Id.* at 1845:16-21. Likewise, Gary Graves, the acting County Executive for Santa Clara County, testified that a fifteen percent vacancy rate is generally necessary in Santa Clara County's jail system. *Id.* at 2275:3-6.

This testimony establishes that, when a prison or jail's population reaches 100% design capacity, its administrators lose the flexibility required to classify

inmates and to move prisoners in accordance with their needs. We have already noted that overcrowding prevents the state from providing constitutionally adequate medical and mental health care in part by preventing the proper classification of inmate medical and mental health needs, limiting the state's ability to bring inmates to required appointments and services, and preventing the state from transferring inmates into necessary clinical placements. Accordingly, the testimony suggests that the state's ability to provide constitutionally adequate medical and mental health care is hampered at 100% design capacity.

Despite this evidence, plaintiffs do not seek an order capping the prison system's population at 100% design capacity. Instead, they seek a cap at 130% design capacity, acknowledging that constitutionally adequate medical and mental health care can be provided in such circumstances. Plaintiffs' proposed population limit is drawn from a recommendation by the Governor's own prison reform personnel. To implement the prison building and prison reform projects authorized by AB 900, the Governor established a series of strike teams, and Deborah Hysen became head of the Facilities Strike Team in May 2007. Sept. 3, 2008 Hysen Dep. at 12:8-10, 15-17. In that role, Ms. Hysen suggested that the CDCR impose two limits on the state prison population. First, she suggested that new prison beds built pursuant to AB 900 be allocated in a manner that would limit overcrowding to no more than 145% design capacity. Ex. P128 at 1, 6 (Aug. 13, 2007 AB 900 Strike Team memo). Hysen acknowledged that housing prisoners at 145% design capacity "does not meet federal guidelines nor national standards," but she nonetheless believed that a reduction in over-

crowding to 145% design capacity would "begin to moderate and control the department's overcrowding practices." *Id.* at 6. As a long-term goal, however, Hysen suggested that the prison system's population should not exceed 130% design capacity, the federal standard for prison overcrowding. *Id.*; Hysen Dep. at 94:13-24. Ms. Hysen also suggested that the CDCR consider "establishing planning capacity and oversight mechanisms to prevent the occurrence of exceeding this [130%] threshold." Ex. P128 at 6.

Plaintiffs' experts testified that the 130% cap recommended by Ms. Hysen would be sufficient to remedy the constitutional violations here. Secretary Lehman testified that "housing California prisoners at 130% design capacity will give prison officials and staff the ability to provide the necessary programs and services for California's prisoners." Aug. 15, 2008 Lehman Report ¶ 20. Doyle Wayne Scott, the former executive director of the Texas Department of Criminal Justice, testified that Ms. Hysen's 130% recommendation was "a realistic and appropriate place for CDCR to be, to ensure that its prisons are safe and provide legally required services," Aug. 13, 2008 Scott Supp. Report ¶ 18. Secretary Woodford also agreed with Ms. Hysen's recommended 130% cap. Aug. 15, 2008 Woodford Supp. Report ¶ 3.

Notably, however, both Director Scott and Secretary Woodford qualified their endorsement of the 130% cap by stating that certain facilities could not provide constitutionally sufficient medical and mental health care when filled to 130% design capacity. Woodford noted that "different (and particularly older) facilities might require slightly lower population limitations, based on the quality of infrastructure and availability of treatment space, for exam-

ple." *Id.* According to Scott, "[W]hile [130%] might be appropriate for new construction, it should be used carefully in CDCR's old, decaying facilities, with their failing infrastructure. Crowding prisoners at 130% is an appropriate goal for CDCR, speaking broadly, but some facilities might only be able to support and provide appropriate health care for smaller numbers." Aug. 13, 2008 Scott Supp. Report ¶ 18.

Although Director Scott and Secretary Woodford suggested that a 130% limit might be too high in certain instances, other evidence suggested that a cap above 130% might be sufficient. For example, Dr. Ronald Shansky testified that the Illinois prison medical system was brought into constitutional compliance at 140% design capacity. Rep. Tr. at 479:2-16. Similarly, the Corrections Independent Review Panel determined in 2004 that the California prison system's "operable capacity" was 145% of its design capacity. Ex. P4 at 124. The Panel's estimate was prepared by a group of experienced California prison wardens, who suggested that a system operating at 145% design capacity could "support full inmate programming in a safe and secure environment." *Id.*

Numerous witnesses testified, however, that the Panel's operable capacity estimate suffers from a potentially fatal flaw for purposes of measuring the constitutional requirements relating to medical and mental health care. Operable capacity does not take into account the ability to provide that care. Thus, the wardens did not consider prisoner medical or mental health needs in reaching their estimate. *See* Ex. P4 at 161 n.3; Nov. 9, 2007 Scott Report ¶ 46 ("[The expert panel's] definitions [of design capacity, operational capacity, and maximum safe and reasonable capacity], however, still fail to look at the capa-

bility of a system or individual facility to adequately and legally care for the medical and mental health needs of its population. . . . "). According to Dr. Stewart, "The [maximum operable capacity] incorporated educational, vocational, substance abuse, and other rehabilitation programming, but did not account for programming associated with mental health or medical treatment. . . . When mental health treatment needs are taken into account, the maximum operable capacity will be lower." Aug. 15, 2008 Stewart Supp. Report ¶¶ 126-27. Likewise, Dr. Haney reported that

> the Panel's estimate of [maximum operable capacity] did *not* specifically contemplate, take into account, or attempt to calculate the *additional* space and staffing levels that would be required to provide constitutionally adequate mental health and medical care . . . . When these crucial mental health and medical treatment needs are taken into account—as they must be in any calculation aimed at addressing the primary cause of these continuing constitutional violations—then the appropriate percentage for maximum operable capacity would certainly be lower than the Panel's and wardens' estimates of 145%.

Aug. 15, 2008 Haney Report ¶¶ 383, 385.

Plaintiffs' experts convincingly demonstrated that, in light of the wardens' failure to consider the provision of medical and mental health care to California's inmates and in light of their reliance on maximum operable capacity, which does not consider the ability to provide such care, the Panel's 145% estimate clearly exceeds the maximum level at which the state could provide constitutionally adequate medical and

mental health care in its prisons. Unfortunately, plaintiffs' experts did not calculate the extent to which the operable capacity of California's prisons exceeds the percentage necessary for the provision of constitutionally adequate medical and mental health care. *See* Aug. 15, 2008 Stewart Supp. Report ¶ 127 (stating only that the maximum operable capacity of California's prisons is lower than 145%); Aug. 15, 2008 Haney Report ¶ 385 (same); *see also* Aug. 15, 2008 Haney Report ¶ 385 (describing 145% as "a very conservative estimate of [maximum operable capacity]" that is "the *outer* limit or *maximum* capacity *in a range* that is intended to eliminate the constitutional violations that are at issue here" (last emphasis added)). Even more unfortunately, as noted earlier, defendants introduced no evidence suggesting that the population of California's prisons should be reduced to some level above 130%.

Although there is strong evidence that a prison system operating at even 100% design capacity will have difficulty providing adequate medical and mental health care to its inmates, the evidence before the court establishes that California's prisoner population *must* be reduced to some level between 130% and 145% design capacity if the CDCR's medical and mental health services are ever to attain constitutional compliance. The evidence in support of a 130% limit is strong: Both national standards and the Governor's own strike team, which adopted those standards, suggest 130% design capacity as a reasonable upper limit on the prison system's population. However, we cannot determine from the evidence whether the national standard selected by the Governor's strike team represents a judgment regarding the mandates of the Constitution or whether it merely reflects a policy that ensures desirable prison

conditions. Other, far less persuasive evidence at trial suggested that California might be able to remedy the constitutional violations at issue in *Plata* and *Coleman* if the population of the CDCR's adult institutions were reduced to 140% or somewhere else lower than 145% design capacity. Exercising the caution and restraint required by the PLRA, we credit this evidence to the extent it suggests that the limit on California's prison population should be somewhat higher than 130% but lower than 145%. Rather than adopting the 130% limit requested by plaintiffs, we will out of caution require a reduction in the population of California's adult prison institutions to only 137.5% of their combined design capacity—a population reduction halfway between the cap requested by plaintiffs and the wardens' estimate of the California prison system's maximum operable capacity absent consideration of the need for medical and mental health care. At the adult institutions' present design capacity of 79,828, Ex. P135 (CDCR weekly population report as of August 27, 2008), this equates to a population of just below 110,000.[63] Should the state prove unable to provide constitutionally adequate medical and mental health care after the prison population is reduced to 137.5% design capacity, plaintiffs may ask this court to impose a lower cap.[64]

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[63] Of course, our order is based on a percentage of design capacity. If the CDCR closes existing prisons or constructs new prisons or prison beds, the system's design capacity will change, and our order will therefore require a prison population than just below 110,000. *See supra* Section V.A.1.d.

[64] We recognize that certain institutions and programs in the system require a population far below 137.5% design capacity. We trust that any population reduction plan developed by the state in response to our opinion and order will properly account

Similarly, should it appear that the provisions set forth in the plan adopted by the court will not achieve the expected population reduction, plaintiffs may seek to have the plan amended.

VII. POTENTIAL POPULATION REDUCTION MEASURES AND THEIR IMPACT ON PUBLIC SAFETY AND THE OPERATION OF THE CRIMINAL JUSTICE SYSTEM

Before we enter a population reduction order, we must give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626 (a)(1)(A). To aid us in meeting this requirement, the parties devoted nearly ten days of trial to this issue and submitted hundreds of exhibits. The impressive collection of evidence before the court included testimony from former and current heads of corrections of five states; top academic researchers in the field of incarceration and crime; CDCR officials; and county officials, district attorneys, probation officers, and sheriffs from across California. We also had the benefit of many state-commissioned reports that proposed various measures for safely reducing the overcrowding in California's prison system. Indeed, four of plaintiffs' experts—Dr. Austin, Dr. Beard, Dr. Krisberg, and Secretary Lehman—had previously been appointed by the CDCR to serve as members of the Expert Panel on Adult Offender Recidivism Reduction Programming. We give substantial consideration to the report from this panel, which recommended a number of measures that it believed would help to safely reduce overcrowding in

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for the particular limitations and needs of individual institutions and programs.

California's prisons, as a necessary first step to reducing recidivism; it included a list of ten related reforms that have been repeatedly recommended to the state, Ex. P2 at 77, some of which we discuss below.

We begin by emphasizing the nature of the order this court issues herein. The order requires the state to reduce California's prison population to 137.5% design capacity within two years and to submit a plan within 45 days to implement our order. As we discuss below, there are a number of population reduction measures that will not have an adverse impact on public safety and that in fact may improve public safety, all of which have been previously recommended to the state, in various reports, by experts it retained to examine ways to reduce California's high recidivism rate.[65] Any or all of these measures may be included in the state's plan. Whichever solutions it ultimately chooses, the evidence is clear that the state can comply with our order in a manner that will not adversely affect public safety. Indeed, the evidence is clear that the state's continued failure to address the severe crowding in California's prisons would perpetuate a criminogenic prison system that itself threatens public safety.

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[65] The state recidivism rate is the ratio of the number of felons returned to prison during a specific period to the number of felons paroled during the same period, times one hundred. Ex. DI-600 at 4. The CDCR's statistics on recidivism show return-to-prison rates within three years, and they include returns for technical parole violations. Rep. Tr. at 1373:3-20 (Woodford). California's recidivism rate is one of the highest in the country. *See* Aug. 15, 2008 Bennett Report ¶ 58; Aug. 15, 2008 Austin Report ¶¶ 9-11; Ex. P2 at 88.

In addressing the potential impact on public safety of our population reduction order, we do not ignore the serious fiscal crisis presently facing the state of California. We are aware that California will not through its ordinary budget process increase its expenditures in order to ameliorate or resolve the constitutional issues it confronts. However, as we explain below, a reduction in California's prison population would produce significant savings, some of which, even with a budget reduction, could be used to fund effective rehabilitative and reentry programming in the prisons and to help county and local governments meet any additional costs resulting from their expansion of existing programs in order to meet the needs of persons affected by a population reduction order who may require county or local services. Even if the state were not to use any savings for such purposes, population reduction could be accomplished without any significant adverse impact on public safety or the operation of the criminal justice system. A number of the population reduction measures that have been recommended by the various expert committees do not require any substantial additional expenditures, and, in many instances, any additional burdens on county and local governments resulting from the prison population reduction would fall within current fluctuations in the demand for existing services.

In any event, we cannot now determine with finality whether the population reduction plan the state will propose in response to our order would have an adverse impact upon public safety or the operation of the criminal justice system. We do know, however, that the state *could* comply with our population reduction order without a significant adverse impact upon public safety or the criminal justice system's

operation; the evidence before us clearly establishes its ability to do so. We will consider the impact of the state's actual population reduction plan before approving it or any modified or substitute plan. Whatever plan we do adopt will be consistent with our obligation to accord substantial weight to any adverse impact involved.

A. *Criminogenic Nature of Overcrowded Prisons*

As an initial matter, we conclude that the current combination of overcrowding and inadequate rehabilitation or re-entry programming in California's prison system itself has a substantial adverse impact on public safety and the operation of the criminal justice system. A reduction in the crowding of California's prisons will have a significant positive effect on public safety by reducing the criminogenic aspects of California's prisons.

Defendants do not credibly dispute the above conclusion, although they argue that California's criminal justice system is no different from that of other jurisdictions. In a certain sense they are correct. For example, California's incarceration rate for prisoners sentenced to more than one year in state or federal prisons is about 475 per 100,000 residents, close to the national average. Cate Trial Aff. ¶ 22. California does not incarcerate felons at an unusually high rate, *id.* ¶¶ 23-24, and the average prison sentence imposed and served in California is lower than the national average, *id.* ¶ 25. However, as convincingly explained by Professor Joan Petersilia, an expert on the California prison system and a member of the

CDCR's Rehabilitation Strike Team,[66] "the similarities end once an individual has been sentenced to prison. California truly is different when it comes to the way inmates are housed, the way they are treated while incarcerated, the way they are released, and the way their parole is handled and revoked." Ex. P5 at 9 (May 2006 California Policy Research Center Report, "Understanding California Corrections"). As a consequence, although California spends billions of dollars on its prison system, it has "one of the highest return-to-prison rates in the nation." *Id.* at ix. In 2005, 66% of offenders released from the California prison system returned to prison within three years. *Id.* At least two experts reported that California's recidivism rate is at 70 percent. Aug. 15, 2008 Bennett Report ¶ 58; Nov. 9, 2007 Austin Report ¶ 42.

The evidence clearly establishes that, because of overcrowding, the state is limited in its capacity to classify inmates properly according to their security risk or programming needs. *See, e.g.*, Rep. Tr. at 2013:21-23 (Lehman); *id.* at 145:15-18 (Scott); *id.* at 225:21-227:13 (Beard); Aug. 15, 2008 Lehman Report ¶ 8; Nov. 9, 2007 Woodford Report ¶ 13. In addition, a December 2007 report from the CDCR's Rehabilitation Strike Team found that "fully 50% of all exiting California prisoners did not participate in *any* rehabilitation or work program nor did they have a work assignment, during their entire prison term. . . . " Ex. P113 at 13 (December 2007 report, "Meeting the Challenges of Rehabilitation in California's Prison and Parole System: A Report from Governor Schwar-

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[66] The Rehabilitation Strike Team was established by Governor Schwarzenegger to develop and implement prison and parole programs for the CDCR. Ex. P113 at 10.

zenegger's Rehabilitation Strike Team") (hereinafter "Rehabilitation Strike Team Report") (emphasis in original); *see also* Sept. 22, 2008 Marquart Supp. Report ¶ 5 ("[O]f the 134,000 prisoners who exited California's prisons in 2006, only 7% participated in substance abuse programs and only 10% participated in vocational education while incarcerated."). The CDCR's Undersecretary of Programs Kathryn Jett believed that the same remained true as of August 2008. Rep. Tr. at 1731:4-8.

Witnesses for plaintiffs and defendant-intervenors with substantial experience administering or studying correctional and law enforcement systems testified that, in such conditions, high-risk inmates do not rehabilitate and low-risk inmates learn new criminal behavior.[67] *E.g.*, Rep. Tr. at 1580:5-9 (Beard) ("They are probably getting worse with the environment that they're in, associating with the higher risk people and with the overcrowding, with the violence, those lower risk people are probably going to be more likely to reoffend."); *id.* at 1052:19-1053:9 (Powers) (Stanislaus County Chief Probation Officer) (testifying that, as a probation officer, he would prefer to treat offenders in the community because offenders come out of prison worse than when they went in); *id.* at 2777:2-19 (Meyer) (Yolo County Chief Probation Officer) ("When I toured the prisons with the intervenors some time ago, I was actually shocked about how almost nothing positive is going on, how crowded it was. It's an issue that—that it seems like they produce additional criminal behavior."); *see also id.* at 385:23-25 (Woodford) ("I absolutely believe that we make people

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[67] Low-risk inmates are those with low risks of reoffending, whereas high-risk inmates are those with high risks of reoffending. *See* Rep. Tr. at 1170:25-1171:22 (Powers).

worse, and that we are not meeting public safety by the way we treat people."). California's prisons, in other words, are serving as "crime school[s]." *Id.* at 2014:1 (Lehman).

According to Secretary Lehman, the former head of corrections in Washington, Maine, and Pennsylvania, "there's only one term you can use" to describe California's overcrowded prisons: "criminogenic."[68] *Id.* at 2013:18-2014:1. The criminogenic environment in the prison system means that "[e]ach year, California communities are burdened with absorbing 123,000 offenders returning from prison, often more dangerous than when they left." Ex. P3 at 17 (Jan.2007 Little Hoover Commission Report, "Solving California's Corrections Crisis: Time is Running Out"). This situation presents a clear threat to public safety and the operation of the criminal justice system. *See* Rep. Tr. at 1580:17-19 (Beard); *id.* at 974:11-22 (Haney).

The state has recently attempted to reduce these criminogenic effects by implementing a new case management system. However, the CDCR is still in the preliminary stages of implementing this new programming. As of August 2008, there was no system in the prisons "'to deliver the right inmate to the right program,'" Rep. Tr. at 1727:23-24 (quoting Jett Dep.), and, at the time of trial, the case management system was in "its infancy," *id.* at 1713:3-5 (Jett).

Defendants do not dispute the overwhelming evidence that overcrowding in prisons itself threatens public safety, nor could they. In fact, in his 2006 Prison Overcrowding State of Emergency Proclamation, Governor Schwarzenegger found that "over-

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[68] Something that is "criminogenic" contributes to the occurrence of crime. *See* Rep. Tr. at 2013:19-20 (Lehman).

crowding causes harm to people and property, leads to inmate unrest and misconduct, reduces or eliminates programs, and increases recidivism as shown within this state and in others." Ex. P1 at 2. The contention by defendants' expert Dr. James Marquart that "there is no clear evidence that overcrowding by itself automatically leads to violence," Aug. 14, 2008 Marquart Prelim. Report at 7-8, is unpersuasive, but in any event, it does not directly contradict the evidence that crowding increases recidivism. Moreover, even if Dr. Marquart is correct that there is no "systematic empirical investigation" confirming the "pernicious effects" of overcrowding, Aug. 27, 2008 Marquart Rebuttal Report ¶ 3, we credit the testimony of correctional and law enforcement experts who have seen and studied the conditions in California prisons and convincingly opined that they do adversely affect public safety.

Accordingly, we find that California's overcrowded prisons are criminogenic and, as the Governor declared in his State of Emergency Proclamation, Ex. P1 at 2, have an adverse effect on public safety. Mitigating prison overcrowding could improve public safety by rendering possible the proper classification of inmates and the expansion and targeting of rehabilitation programming. *See* Ex. P2 at 9-10 (June 2007 CDCR Expert Panel on Adult Offender Recidivism Reduction Programming Report to the California State Legislature, "A Roadmap for Effective Offender Programming in California") (recommending population reduction measures in order to reduce recidivism rates).

B. *Potential Population Reduction Measures*

There was overwhelming agreement among experts for plaintiffs, defendants, and defendant-intervenors

that it is "absolutely" possible to reduce the prison population in California safely and effectively. Rep. Tr. at 2189:9-23 (Bennett) (Sonoma County corrections expert); *see, e.g., id.* at 2101:24-2102:1 (Krisberg) (plaintiffs' expert); *id.* at 1995:8-20 (Marquart) (defendants' expert); *id.* at 2012:20-25 (Lehman) (plaintiffs' expert); *id.* at 1327:3-6 (Woodford) (plaintiffs' expert).

Plaintiffs proposed several measures to reduce the prison population. The first, the expansion of the good time credits system, would allow eligible low-to moderate-risk inmates to be released a few months early in exchange for complying with prison rules and participating in rehabilitative, education, or work programs. The second and third, the diversion of technical parole violators and of low-risk offenders with short sentences, would keep low-risk offenders in community correctional systems rather than incarcerating them in prison for a few months. The fourth, the expansion of evidence-based rehabilitative programming, would reduce the prison population by addressing offenders' rehabilitative needs, thus lowering their likelihood of reoffending.[69]

Many of the witnesses presented by defendant-intervenors objected to simply throwing open the prison doors and releasing inmates early in a generic manner, erroneously assuming that such a remedy might be contemplated or ordered by the court. *See, e.g.*, Rep. Tr. at 1087:16-22 (Packer) ("When they said 'prison release,' I thought they were literally releas-

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[69] Plaintiffs also propose shortening the length of parole supervision, which would have a more immediate and direct impact on the distribution of parole resources than on the prison population. For that reason, we discuss this proposal separately. *See infra* Section VII.C.3.

ing people from the prison."); *id.* at 1052:8-12 (Powers) (stating that he prefers his population reduction proposal to "let's throw the door open, and in six months from now we will be there"); Aug. 15, 2008 Bennett Report ¶ 13 ("The wholesale release of inmates would only shift the crowding problem to the counties and provide nothing more than temporary relief to the state."); Bay Stip. ¶ 7 (Director of San Mateo County Department of Housing) ("I am assuming that the prisoner release order is a one-time event and not part of a pattern of shorter sentences for a class of prisoners."). However, many of the same witnesses, as well as others presented by defendants and defendant-intervenors, testified that they supported other measures for reducing the prison population, including measures substantially similar to those proposed by plaintiffs. *E.g.*, Rep. Tr. at 1086:20-1087:22 (Packer) (recommending diversion of mentally ill inmates from the prisons); *id.* at 1041:12-1045:11 (Powers) (stating that a prison population reduction could be achieved safely by investing in probation); Aug. 15, 2008 Bennett Report ¶¶ 68-71, 75-76 (recommending systemic changes, including reducing return to incarceration as a sanction for technical parole violations and enhancing community-based sanctions programs); *see also* Buddress Trial Decl. ¶ 3 (San Mateo County Chief Probation Officer) (supporting population reduction measures proposed by plaintiffs' expert Dr. Krisberg); Dalton Am. Trial Decl. ¶¶ 17-26 (Los Angeles County Sheriffs' Department, Director of Bureau of Operations for Bureau of Offender Programs and Services) (recommending diversion to community corrections, sentencing reform, diversion of technical parole violators, and re-entry programming); Rep. Tr. at 2770:23-2771:10 (Meyer) (testifying that, if appropriate

programs were funded, the population could be reduced by about 30% while crime was also reduced); Dumanis Trial Decl. ¶¶ 16-20 (San Diego District Attorney) (supporting re-entry programming and rehabilitative and diversion programs); Boesch Trial Decl. at 13 (San Mateo County Assistant County Manager) (supporting rehabilitation programs and graduated sanctions).

We do not suggest that plaintiffs' proposed methods are the only ways to reduce the prison population without adversely affecting public safety and the criminal justice system. We have discussed some other methods earlier, *supra* Section V.A.4 (discussing the state's proposals to transfer inmates out of state or into federal custody), and will discuss others later, *supra* Section VII.B.5 (discussing, *inter alia*, sentencing reform and modifications of criminal statutes). There are other proposals as well that have been recommended by various state commissions or bodies that may be worthy of consideration. Our discussion here is not necessarily exhaustive.

First, we consider plaintiffs' four proposed population reduction measures. They are substantially similar to those proposed by the Governor and many correctional experts. We find credible the evidence that these measures, properly implemented, would not adversely impact public safety or the operation of the criminal justice system. We also find that these measures are feasible, and that they could achieve the population reduction required to achieve constitutional levels of medical and mental health care delivery.

1. *Early Release Through Expansion of Good Time Credits*

California, like the federal government and nearly every other state, has a system through which inmates can earn credits to reduce their prison sentences by complying with prison rules or by participating in rehabilitative, education, or work programs. *See, e.g.*, Rep. Tr. at 1398:6-15 (Austin); *id.* at 1549:23-1550:14 (Beard). California's inmates can earn credits off their prison sentences through "participation in work, educational, vocational, therapeutic or other prison activities" and for good behavior. Cal.Penal Code §§ 2931, 2933.[70] CDCR Undersecretary Jett testified that the purpose of California's good time credits system is to provide an incentive for inmates to participate in education and work programs because those programs can reduce recidivism. Rep. Tr. at 1724:6-16.

Experts presented by plaintiffs, defendants, and defendant-intervenors all supported the expansion of this good time credits system. Secretary Lehman and Secretary Woodford both recommended the expansion of the credit system as a way to reduce the prison population without adversely affecting public safety. *See* Aug. 15, 2008 Lehman Report ¶ 13; Rep. Tr. 1326:21-1327:2, 1361:2-13 (Woodford). The public safety experts for defendants and defendant-intervenors criticized generic early release programs but testified that they were not opposed to the good time credits system. *See* Rep. Tr. at 1991:22-25 (Marquart) (stating that he is not opposed to granting

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[70] These credits are referred to, variously, as earned good time credits, good time credits, earned credits, time credits, or earned time credits.

earned credits for compliance with prison rules);[71] Aug. 15, 2008 Bennett Report ¶ 79; Rep. Tr. at 1015:21-1016:2 (Rodriguez).

Defendants themselves have proposed the expansion of earned good time credits, and they would "[o]f course not" propose plans that would endanger public safety. *Id.* at 1685:3-15 (Cate); *id.* at 1921:14-1922:1 (Kernan). The Governor's 2008 and 2009 budget proposals included an enhancement in the award of good time credits for up to four months for each program successfully completed by an eligible inmate, reasoning that "[i]ncentivizing program participation and completion will reduce inmate violence within the CDCR and will facilitate the inmate's reintegration into society." Ex. P780 at 18 (Governor's Budget, Special Session 2008-09); Jan. 16, 2009 Sturges Decl., Ex. A at 28 (2009-10 Governor's Budget).[72] The Corrections Independent Review Panel chaired by former Governor Deukmejian also recommended the expansion of the earned time credits system as one component of comprehensive reform of the prison system. Ex. P4 at 122, 130. The CDCR Expert Panel made the same recommendation. *See* Ex. P2 at ix, 92.

Expansion of the good time credits system would reduce the prison population by allowing inmates to shorten their lengths of stay in prison by a few

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[71] Dr. Marquart criticized the earned credit system implemented in Texas in his expert report, *see* Aug. 14, 2008 Marquart Report at 19, but testified that he was not opposed to earned credits more generally. As we discuss below, Dr. Marquart's testimony on this issue is contradictory and unreliable.

[72] We do not consider here other proposed measures in budget messages submitted by the Governor post-trial. We are aware, however, that they contain additional proposals for reducing the prison population safely.

months. The evidence indicates that such moderate reductions in prison sentences do not adversely affect either recidivism rates or the deterrence value of imprisonment. According to Dr. Austin, a correctional sociologist and plaintiffs' expert, criminologists have known "for many, many, many years" that generally "there is no difference in recidivism rates by length of stay" in prison, so reducing the length of stay by a "very moderate period of time"—four to six months—would have no effect on recidivism rates. Rep. Tr. at 1387:1-11. Other experts, including an expert for defendants and an expert for defendant-intervenors, agreed with the proposition that there is no statistically significant relationship between an individual's length of stay in prison and his recidivism rate. *E.g.*, *id.* at 1325:11-16 (Woodford); *id.* at 1995:21-24 (Marquart); *id.* at 1154:18-24 (Powers); *see also* Ex. DI-204 at 1 (April 2007 National Council on Crime and Delinquency report, "Effect of Early Release from Prison on Public Safety: A Review of the Literature"). Dr. Austin's study of the CDCR data confirmed that this is true of inmates in California's prisons. Aug. 27, 2008 Austin Supp. Report ¶¶ 4-8.[73] Similarly, a moderate reduction in an inmate's length of stay in prison would not affect the deterrence value of imprisonment. According to two correctional experts, including one presented by a defendant-intervenor, "certainty of punishment" and "the quickness with which penalties are brought to bear" have a much bigger effect on deterrence than a marginal difference in the level of sanctions. Rep. Tr. at 2106:2-7 (Krisberg) ("There's a pretty large consensus that minor

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[73] In fact, some evidence suggests that properly targeted early release programs can actually reduce recidivism rates. *E.g.*, Sept. 8, 2008 Krisberg Report at 5.

reductions [in sanctions] are not going to make a big difference."); *id.* at 2194:19-2195:18 (Bennett) (testifying that "[i]t's not the severity of the sanction that's important" but "the certainty and the immediacy of it").

Defendants' expert Dr. Marquart opined as a general proposition that shortening the length of stay in prison by "advancing good time credits" could negatively impact recidivism because it might reduce the opportunity for inmates to complete rehabilitation programming. *E.g.*, Aug. 14, 2008 Marquart Prelim. Report at 20-21.[74] Dr. Marquart's opinion amounts, at most, to a note about the factors that should be considered in designing an effective expanded good time credits system. It is entitled to little, if any, weight as an observation about the possible negative effect on public safety of such a system. First, as noted above, approximately 50% of the 134,000 inmates released from California's prisons annually are currently released without the benefit of any rehabilitation programming and, in fact, evidence shows that inmates with shorter sentences are especially unlikely to benefit from such programming at this time.[75] *See*

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[74] Dr. Marquart stated that shortening the inmates' lengths of stay might present a particular problem with respect to inmates in conservation camps who are trained to fight fires. Aug. 14, 2008 Marquart Prelim. Report at 21. It appears, however, that his concern with respect to these inmates is not that their recidivism rates would increase but that "their release could severely impact the services these inmates render to the state." *Id.*

[75] Inmates with short sentences who participate in San Diego County's community reentry program are receiving some rehabilitation programming in prison. San Diego, however, is the only county that has implemented such a program since the 2005 passage of Senate Bill 618, which authorized them. At the time of the trial, San Diego's program had only 389 inmate-par-

Ex. P113 at 13 (Rehabilitation Strike Team Report); Ex. P5 at 76. Thus, for at least 50% of the inmates released from California's prisons each year, an expanded good time credits program would not, at present, reduce their opportunities to complete rehabilitation programs.

More important, defendants are at the beginning stages of expanding rehabilitation programming in the state's prison system. The CDCR has recently begun to implement an evidence-based system of rehabilitation programming to reduce recidivism, and it has also taken steps to increase utilization of existing educational, vocational, and substance abuse programs. Rep. Tr. at 1710:20-1711:19, 1714:19-1715:1 (Jett). The evidence is clear that expanded rehabilitation programming, and expanded inmate participation in such programming, is a necessary component of California's goal of reducing its high recidivism rate. One of the proposals advanced by Defendant Governor Schwarzenegger in his 2008-09 budget would authorize the CDCR to provide "up to four months of earned credit for each program successfully completed by an eligible inmate." Ex. P780 at 18. Thus, the Governor contemplates *completion* of rehabilitation programs as one of the foundations of an expanded earned good time credits system.

We also reject the testimony that inmates released early from prison would commit additional new crimes. Even aside from the fact that many of these individuals would be less likely to reoffend because they benefitted from completing rehabilitative programs, the weight of the evidence showed that,

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ticipants. Rep. Tr. at 987:9-16 (Rodriguez) (San Diego County Deputy District Attorney).

because length of stay is unrelated to recidivism, all else being equal the likelihood that a person who is released a few months before his original release date will reoffend is the same as if he were released on his original release date. *See, e.g.*, Rep. Tr. at 1966:20-1967:5 (Marquart); *id.* at 2653:2-15 (Yim) (Chief of Correctional Services Division of the Los Angeles County Sheriff's Department). Shortening the length of stay in prison thus affects only the timing and circumstances of the crime, if any, committed by a released inmate—*i.e.*, whether it happens a few months earlier or a few months later. *Id.* at 1329:16-19 (Woodford); *id.* at 2319:1-23 (Dyer) (City of Fresno Police Chief); *id.* 1569:11-20 (Beard); *id.* 2163:12-19 (Krisberg); *see also id.* at 1769:5-13 (Hoffman) (CDCR's Director of Adult Parole Operations) (testifying that returning technical parole violators to prison only postpones victimization and crime). Although there might be an increase in arrests in the initial months of an early release, *see, e.g.*, Austin Aug. 15, 2008 Report ¶¶ 93-95; Austin Aug. 27, 2008 Report ¶ 9, this increase represents only a concentration in the number of arrests that would have happened in any event and does not affect the total number of arrests. While the victims of crimes may be different, and we do not underestimate the significance of early release to those victims, our concern under the PLRA is to consider the overall impact on public safety, which we find would be no different.

Thus, the testimony by defendant-intervenors regarding the increased arrests that followed early releases in two counties and one city does not undermine our conclusion that early release through an expanded good time credits program could be implemented without adversely affecting public safety. Defendant-intervenors' witnesses offered the

following testimony. In Orange County in the 1990s inmates were released early due to court-ordered population caps, and a number were rearrested for crimes committed during the time they would otherwise have been in custody. Ex. DI-628 (July 1, 1997 Sheriff's Presentation on Theo Lacy [Jail] Expansion to Orange County Board of Supervisors); *see also* Dostal Decl. ¶ 11 (Executive Director of Administrative Services for Orange County Sheriff's Department); Dostal Supp. Decl. ¶ 2. In Los Angeles County, 10% of those released from jail pursuant to an early release program were rearrested during the period of early release, including 16 for murder, over a five-year period. Rep. Tr. 1811:18-1812:4, 1824:14-15 (Smith) (Lieutenant in Los Angeles County Sheriff's Department Custody Support Services Division). While this evidence may suggest an accelerated arrest pattern, it does not show an increase in the overall crime rate. Chief Dyer of the Fresno Police Department testified that when an increased number of parolees were released in 2005 as part of an earned credits program, the city experienced an increase in crime, *id.* at 2329:20-2330:11, but his testimony again did not reveal whether the crime represented only a temporary bulge, whether other factors affecting crime remained unchanged, or whether a risk assessment tool—which measures the probability that an offender will recidivate, *see id.* at 2128:24-2129:1, 2132:6-2134:13 (Krisberg)—was used to target low-to moderate-risk inmates for release.

In fact, empirical evidence from California's communities demonstrates that early release programs—as well as diversion, a population reduction measure we discuss in more detail below—do not increase crime. Dr. Krisberg reviewed data provided by Cali-

fornia and the FBI and concluded that such programs, which were instituted in twenty-one California counties between 1996 to 2006, resulted in approximately 1.7 million inmates released by court order but did not result in a higher crime rate. Sept. 8, 2008 Krisberg Report at 10. This is persuasive evidence that the early release program proposed by plaintiffs poses no threat to public safety or the operation of the criminal justice system.

Furthermore, if the good time credits system is expanded and programming enhanced, it is likely that recidivism will decrease. Expansion of the good time credits system could include an "increase in the number of credits that prisoners can earn for participation in programs, or being in compliance with a case management plan." Rep. Tr. at 1387:16-18 (Austin). Such an incentive contributes to a decline in recidivism because "it gives [inmates] what they need [in order] to keep them out of prison in the future," *id.* at 1549:21-22 (Beard), as determined by an evidence-based assessment of the underlying factors, such as addiction or lack of vocational skills, that may have driven the inmate's criminal behavior. *Id.* at 1550:18-1551:19 (Beard); *see also id.* at 1398:21-1399:1 (Austin) (reducing sentence length due to inmate's completion of an education program is a "win-win" because it lowers the length, and therefore the cost, of incarceration and lowers the likelihood of the inmate's recidivism upon release). The evidence tendered thus confirms the conclusion of the CDCR Expert Panel that "the public safety benefits of [expanding good time credits] will be a vast improvement over California's current practice of releasing offenders who have not completed rehabilitation programming." Ex. P2 at 12.

Based on all of the above, we conclude that shortening an inmate's length of stay in prison would not increase recidivism rates, and that shortening the length of stay through earned credits would give inmates incentives to participate in programming designed to lower recidivism. We credit the opinions of the numerous correctional experts that the expansion of good time credits would not adversely affect but rather would benefit the public safety and the operation of the criminal justice system. We also note that this is the view of the Governor, who has recommended the adoption of an earned credit program as a means to better "facilitate the inmate[s'] reintegration into society." Ex. P780 at 18 (Governor's Budget, Special Session 2008-09).

2. *Diversion of Technical Parole Violators*

California has a "very abnormal practice" of sending a high number of technical parole violators to prison for a short of amount of time.[76] Rep. Tr. 1434:12-14 (Austin); Aug. 15, 2008 Austin Report ¶ 13 (explaining that California's re-arrest rate for parolees is similar to other states, but the high use of imprisonment for parole violations produces a high return to prison rate). In California, more than 70,000 parolees are returned to prison each year for technical parole violations, approximately 17,000 of whom are "pure technical violators" who have not been arrested for a new crime but have only violated

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[76] Technical parole violators are those parolees who have violated their conditions of supervised release but have not been convicted of new crimes. Aug. 15, 2008 Austin Report ¶ 12. The category includes those who have been arrested for new crimes but were not prosecuted or convicted. *Id.*

a term or condition of their parole. Ex. P5 at 72-74; Rep. Tr. at 1739:18-19 (Hoffman).

Evidence—including testimony from Thomas Hoffman, Director of the CDCR's Division of Adult Parole Operations—overwhelmingly showed that California's practice of sending parole violators back into the state prison system for an average of four months and incarcerating them during that time in crowded reception centers endangers public safety and burdens the criminal justice system. *See, e.g.*, Rep. Tr. at 1769:5-13 (Hoffman) (agreeing that "this churning pattern just postpones victimization and crime" and testifying that "we know it's not working"); Ex. P113 at 78 (Rehabilitation Strike Team Report) ("This system of 'catch and release' makes little sense from either a deterrence, incapacitation, treatment, or economic standpoint."). According to research by Professor Petersilia, this high return-to-prison rate for parole violators "is creating a destructive situation by constantly cycling offenders in and out of prison and their home communities in a way that blurs the distinction between the two and combines the worst elements of each." Ex. P5 at 75. Professor Petersilia found that, among other negative effects, this "churning" or "catch-and-release" disrupts the inmate's ability to participate in community-based rehabilitative programs, encourages the spread of prison-gang culture in communities, wastes parole processing resources, and reduces the deterrent value of prison by "transform[ing] a trip to prison into . . . a trivial and short-lived intrusion on day-to-day criminality." *Id.* at 76. Secretary Woodford, the former acting Secretary of the CDCR, agreed with this assessment, based on her experience administering California prisons in various capacities, including as warden at San Quentin. Rep. Tr. at 1316:23-1317:11;

see also Ex. D1196 at DEFS021721 (Integrated Strategy to Address Overcrowding in CDCR's Adult Institutions) ("[C]hurning is costly, does little or nothing to promote public safety and frustrates real efforts at rehabilitation."). Dr. Gilligan, plaintiffs' mental health expert, testified that this practice has a particularly adverse impact on the mentally ill, who are not given adequate treatment or transition plans because of the short length of their return to prison. Aug. 15, 2008 Gilligan Report ¶ 33.

This churning, and its adverse effects, could be stopped in several ways. One is to use a parole revocation instrument to determine whether parole violators should be sent back to prison. Rep. Tr. at 1385:11-21 (Austin); Aug. 15, 2008 Austin Report ¶ 52. Such an instrument has been implemented in a number of states, including Pennsylvania, South Carolina, New Jersey, Oregon, Georgia, Iowa, Kansas, South Dakota, and Texas.[77] *Id.*; Rep. Tr. at 1564:4-1565:8 (Beard). The CDCR has already started implementing reform of the parole system and has developed a "Parole Violation Decision Making Instrument." *Id.* at 1678:15-25 (Cate); Hoffman Trial Aff. ¶¶ 8-13; Ex. D1198 (Sept. 30, 2008 Letter from Jessica R. Devencenzi, Deputy Attorney General, to Michael Bien, Rosen Bien & Galvan, LLP). Secretary Cate called the use of the parole revocation instrument one of the "best practices" in the area of parole reform. Rep. Tr. at 1706:9-14 (Cate). Dr. Austin noted a number of other ways to reduce the return of technical parole violators to prison, including prohibiting parole violators from being readmitted to prison for

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[77] Washington State has a law that prevents technical parole violators from being returned to prison. Aug. 15, 2008 Lehman Report ¶ 16.

technical violations, reducing the period of parole supervision, and instituting an incentive program for parole agents. Aug. 15, 2008 Austin Report ¶¶ 51-54. The Governor has proposed placing all "non-serious, non-violent, non-sex offenders" on summary parole. *See* Ex. P780 at 18 (Governor's Budget, Special Session 2008-09); Jan. 16, 2009 Sturges Decl. ¶ 2 & Ex. A at 28 (2009-10 Governor's Budget); Ex. P328 at 178 (Governor's Budget Summary 2008-09). All of these options may be considered by the state and implemented in a manner that would be consistent with its ultimate objectives.

The use of a "best practices" instrument, as well as other methods referred to above, to reduce the number of parole violators returned to the state prison system, if properly implemented, would not have an adverse impact on public safety or on the criminal justice system. At the very least, slowing the flow of technical parole violators to prison would mitigate the dangerous crowding at reception centers and ease the burden on the parole processing system. It would free up space in the reception centers so that those centers could be used for their original purpose: sorting inmates into the right correctional settings. It would give parolees a better opportunity to participate in continued rehabilitative programming in the community, and it would likely improve a system that currently "undercut[s] the deterrent effect of serving prison time." Ex. P5 at 76. We agree, for example, with the assertion of the CDCR's Director of Adult Parole Operations that the use of a parole revocation instrument in California would "reduce future victimization, increase public safety, and enhance the ability of offenders to become more productive members of the community." Hoffman Trial Aff. ¶ 10.

Additionally, public safety would improve if technical parole violators who are not returned to prison were diverted to alternative sanctions in the community, including drug treatment, day reporting centers, electronic monitoring, and, if necessary, county jail.[78] *See* Rep. Tr. at 1318:21-1319:2 (Woodford). The CDCR already has alternative sanctions programs and is working on expanding the scope and availability of such programs. Hoffman Trial Aff. ¶¶ 19-25. Many of these programs address the offender's criminogenic factors and can thus reduce recidivism. *Id.* The use of graduated sanctions would serve the same deterrent purpose as imprisonment while effectively reducing recidivism. *See* Woodford Aug. 15, 2008 Supp. Report ¶ 32 ("Sanctions other than incarceration are effective in punishing many prisoners and at the same time reducing the risk of recidivism."); Rep. Tr. at 2194:19-2195:18 (Bennett) ("We need to have meaningful, immediate, certain sanctions. And it doesn't have to be a return to prison. We can develop sanctions at the local level. . . . We can have a more effective sanction without interrupting individuals' lives and returning them to prison."). Former CDCR Secretary James Tilton stated that he believed that these alternative community sanctions programs would improve public safety over time. Sept. 3, 2008 Tilton Dep. at 153:4-154:3.

CDCR officials and experts overwhelmingly supported the use of the parole revocation instrument and the diversion of technical parole violators to alternative sanctions in the community. Scott Kernan, the CDCR's Undersecretary of Operations, stated that "[t]hese efforts have proven to reduce prison popula-

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[78] We discuss the likely impact of these measures on the counties *infra* Section VII.C.

tion while maintaining public safety." Kernan Trial Aff. ¶ 23. Experts for plaintiffs, defendants, and defendant-intervenors testified in favor of the diversion of technical parole violators. *E.g.*, Aug. 15, 2008 Lehman Report ¶ 16; Rep. Tr. at 1993:6-8 (Marquart); *id.* at 2194:19-2195:18 (Bennett); Buddress Trial Decl. ¶ 3. The Governor's Rehabilitation Strike Team urged the use of the parole violation instrument and diversion, concluding that "[s]imilar 'best practices' proposals have worked in other states to better prepare inmates for re-entry, reduce prison returns, protect public safety, and reduce the costs of corrections." Ex. P113 at 17, 89-90. The three reports of independent commissions presented to the state—the CDCR Expert Panel Report, the Corrections Independent Review Panel Report, and the Little Hoover Commission Report—also recommended the diversion of technical parole violators. *See* Ex. P2 at 47-49; Ex. P3 at 31; Ex. P4 at 154, 158-59. In fact, according to the CDCR Expert Panel, fifteen reports published since 1990 on California's prison crisis have recommended the diversion of technical parole violators. Ex. P2 at 77.

We conclude that simply slowing the flow of technical parole violators to prison, thereby substantially reducing the churning of parolees, would by itself improve both the prison and parole systems, and public safety. Diversion of parole violators to community alternative sanctions programs would serve to significantly reduce recidivism. We therefore find that diverting parole violators to alternative community sanctions programs would reduce the prison population while having a positive rather than a negative effect on public safety and the operation of the criminal justice system.

3. *Diversion of Low-Risk Offenders with Short Sentences*

Plaintiffs also propose reducing the prison population by diverting low-risk offenders with short sentences for community sanctions. Rep. Tr. 1385:22-1386:21 (Austin); Aug. 15, 2008 Austin Supp. Report ¶¶ 58-61.

According to Dr. Austin, a substantial number of inmates enter the California prison system with sentences of less than twenty-four months, the largest group of which are those with a sixteen-month sentence, many of whom have already served up to seven months of their sentence in a county jail. Rep. Tr. 1386:2-1386:12; Aug. 15, 2008 Austin Supp. Report ¶ 60 & tbl. 5. Under current policies, these inmates can halve the remaining periods of their sentences by earning work credits, with the result that these inmates serve only a few months in state institutions—an amount comparable to that served by technical parole violators. Rep. Tr. 1386:2-1386:12. Like the technical parole violators, these inmates are unlikely to participate in any meaningful programming during their short term of imprisonment. *See* Aug. 15, 2008 Austin Report ¶ 60 ("A diversion program would eliminate a short period of imprisonment within the CDCR (during which the prisoner is unlikely to become involved in any meaningful programming). . . . ").

Instead of incarcerating all of these offenders, the CDCR could use risk assessment instruments to identify low-risk offenders and divert these offenders to community correctional programs to serve their sentences. *See* Rep. Tr. 1386:13-21 (Austin). The state might also consider implementing incentive-based funding for community corrections, similar to that

adopted by California in the 1960s, when the state provided fiscal rewards to counties that reduced the number of people being sent to prison. *See* Rep. Tr. at 1042:4-14 (Powers). This would require the diversion of only a portion of the funds that adoption of the reforms discussed herein would save the state.

A number of correctional and law enforcement experts opined that the diversion of low-risk offenders would not have an adverse impact on public safety or the operation of the criminal justice system. Secretary Woodford stated, based on her prior experiences as the chief probation officer of San Francisco, warden of San Quentin, and acting Secretary of the CDCR, that California "incarcerates many more prisoners than is necessary for the safety of the public." Aug. 15, 2008 Woodford Supp. Report ¶ 32. She stated that there are intermediate sanctions available, and that California would have safer communities if it used those sanctions rather than incarceration in appropriate circumstances. *Id.* The use of such intermediate sanctions would not significantly affect deterrence, as sanctions short of imprisonment have deterrent value so long as they are "meaningful, immediate, and certain." *See, e.g.*, Rep. Tr. at 2194:19-2195:18 (Bennett).

Law enforcement officials from the counties also testified that diversion could improve public safety if implemented correctly. *See, e.g.*, James Trial Decl. ¶¶ 6-7 (Orange County Assistant Sheriff); Rep. Tr. at 2369:5-12 (Dyer); Buddress Trial Decl. ¶¶ 10-11. According to these local law enforcement officials, offenders who have not been to prison "are easier to program [and] treat . . . before they have been exposed to (and potentially trained by) more hardened and experienced criminals in the state prison system."

James Trial Decl. ¶ 20; *see also* Rep. Tr. at 1052:16-1053:10 (Powers) ("[S]o you put someone who is a low risk, low level person into an environment[ ] with high risk individuals, they don't naturally get better. They gravitate up. So when they come out, they are worse off."). According to the testimony of law enforcement and county officials, many counties now successfully divert offenders from jail to substance abuse programs, correctional day reporting centers, and electronic monitoring. *See, e.g., id.* at 2276:19-2277:1 (Graves); *id.* at 2798:3-24 (Hennessey) (City and County of San Francisco Sheriff); Dalton Am. Trial Decl. ¶¶ 33-35. Thus, successful models for community corrections are already in place, and, although the characteristics of the populations that they currently serve may be different from the prison population, they can be expanded to serve an increase in diverted offenders with proper funding and coordination between the state and the counties. *See, e.g.*, Aug. 15, 2008 Garner Report at 6 (Director of Santa Clara County Department of Alcohol and Drug Services) ("Local treatment systems exist in every county and with adequate state funding they can be expanded to accommodate the proposed increase in clients resulting from early release of prisoners."); Meyer Am. Trial Decl. ¶ 69. An expert for the law enforcement intervenors testified that if the state were to establish such programs on a statewide or county-by-county level, the prison population could be reduced, by that reform alone, by about 30%, as a conservative estimate, in two to five years. Rep. Tr. at 2771:4-10 (Meyer).[79]

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[79] The witnesses for defendant-intervenors expressed concern that neither the state nor the counties have the funds to expand

The opinion of these California correctional and law enforcement experts was confirmed by Dr. Beard, the Secretary of the Pennsylvania Department of Corrections, who testified regarding Pennsylvania's success in implementing an intermediate punishment program that diverts offenders from jails and prisons to substance abuse programs. *Id.* at 1554:20-1556:20. A study of that program found that inmates in the program had lower recidivism rates than those sent to county jails or state prisons. *Id.* at 1555:2-5. Dr. Beard testified that "the research is really clear out there that community-based programming is actually more effective than prison-based programming." *Id.* at 1555:21-23. Such programming can contribute to rehabilitation without taking the offender away from the community and creating the problems of re-entry upon release from prison. *Id.* at 1556:1-14. According to Dr. Austin, other states, including Ohio and Michigan, have also successfully adopted diversion programs without an adverse effect on crime. *E.g.*, *id.* at 1399:2-15.

There was testimony that some individuals on electronic monitoring or in other alternative programs have committed crimes, *e.g.*, *id.* at 1179:23-1180:3 (Powers), and we acknowledge that diversion programs cannot stop all crime. But, again, the individuals to be diverted are those who would have been released from prison a few months later in any event, after being exposed to "more hardened and experienced criminals." James Trial Decl. ¶ 20. Thus, the incidents that have occurred during participation in alternative programs do not undermine the weight of the testimony that diversion programs have an over-

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the community correctional system. We address this concern below. *Infra* Section VII.C.

all positive effect on public safety and the operation of the criminal justice system.

We therefore conclude that the diversion of offenders to community correctional programs has significant beneficial effects on public safety and the operation of the criminal justice system as compared to the current system, including preventing the exposure of offenders to criminogenic conditions, providing effective rehabilitation, and avoiding a disruption in the offender's life that creates re-entry problems upon release.

4. *Expansion of Evidence-Based Rehabilitative Programming in Prisons or Communities*

Every witness, from the CDCR's Undersecretary of Programming to law enforcement officers and former heads of correctional systems, testified that an increase in the availability of evidence-based rehabilitative programming—*i.e.*, programs that research has proven to be effective in reducing recidivism, Rep. Tr. at 1042:19-1043:14 (Powers)—in the prisons or in the communities would reduce the prison population and have a positive impact on public safety. *See, e.g., id.* at 1721:16-22 (Jett); *id.* at 1159:14-19 (Powers); *id.* at 1962:15-23 (Marquart); *id.* at 2009:15-2010:1 (Lehman); *id.* at 2728:6-18 (Runner); *id.* at 2385:2-14 (Pacheco) (Riverside County District Attorney); Meyer Am. Trial Decl. ¶¶ 46-52. Research from Washington State concluded that an expansion of evidence-based programming would reduce the prison population, while leading to a net decrease in the crime rate. *See* Ex. D1331 at 15 (Oct.2006 Washington State Institute for Public Policy report, "Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates").

Experience demonstrates the benefits of evidence-based programming. Missouri and Washington have successfully and safely reduced prison populations through such programming. *See* Rep. Tr. at 2767: 21-2768:11 (Meyer). Moreover, the evidence from the law enforcement intervenors and county intervenors overwhelmingly showed that there are already models for successful evidence-based programs all over California, from Yolo County to San Diego County, that have reduced recidivism and thus improved public safety in those communities. *See, e.g., id.* at 2784:25-2785:4 (Meyer); *id.* at 2803:19-2804:1 (Hennessey); Rodriguez Trial Decl. ¶¶ 20-21; Aug. 15, 2008 Bennett Report app. C ch.3 ("Chapter Three: Alternatives to Incarceration" from July 2007 "Sonoma County, California: Corrections Master Plan"). As Chief Probation Officer Meyer stated, successful models "are on the shelf" and ready to be implemented. Rep. Tr. 2784:25-2785:4.

As discussed above, the CDCR has also already begun to design and implement an expansion of rehabilitation services for inmates and parolees. *See* Jett Trial Aff. ¶¶ 6-13; Ex. P79 (July 15, 2008 California Rehabilitation Oversight Board Biannual Report). We agree with Undersecretary Jett, who oversees this process, that its successful implementation would lead to a reduction in recidivism and a reduction in the prison population. *See* Jett Trial Aff. ¶ 13.[80] Improvements in the implementation of the process will become increasingly likely as the reduction in the prison population occurs. The two functions are, in practicality, related.

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[80] Successful implementation of such programming will, of course, require space that is currently not available in California's prisons.

Based on the overwhelming and uncontroverted evidence, we find that additional rehabilitative programming would result in a significant population reduction while improving public safety and reducing the burden on the criminal justice system. If implemented in conjunction with any or all of the population reduction measures described above, such programming would enhance the likelihood that recidivism will decline as the prison population is decreased. Moreover, if implemented within the state prison institutions, such programming would have a synergistic effect on the ability of inmates to reduce their sentences by earning good time credits.

5. *Sentencing Reform and Other Potential Population Reduction Measures*

The evidence at trial focused primarily on the potential effects of the population reduction measures proposed by plaintiffs. However, there are other means as well by which the state could reduce its prisoner population, and the state is in no way bound by plaintiffs' proposals. For example, Expert Panel co-chair Professor Joan Petersilia reported that fifteen studies have been issued regarding California prisons since 1990, all containing essentially the same ten recommendations. Ex. P2 at 77-79. Those recommendations include not only the four population reduction measures proposed by plaintiffs, but also reformation of the state's determinate sentencing regime "to reward prisoners for participating in rehabilitation programs and allow the system to retain prisoners who represent a continued public safety risk," the creation of a sentencing reform commission "authorized to design new sentencing statues into a workable system that balances uniformity of sentencing with flexibility of individualiza-

tion," and the release or diversion of certain "[s]ub-populations, such as women, the elderly and the sick" from prison to community-based facilities. *Id.* at 77. Also, as noted above, the state has suggested that its prison population might be reduced through the transfer of inmates out of state or into federal custody. The state is certainly free to include any of these alternatives in its proposed population reduction plan should it be able to establish the feasibility and the positive effects of such programs, especially their compatibility with public safety.

Like plaintiffs' proposed population reduction measures, the other measures discussed by Professor Petersilia generally would have a positive effect on public safety. In particular, the repeated recommendation that the state establish a sentencing commission and reform its determinate sentencing regime reflects an urgent need for the state to reconsider its counterproductive sentencing practices. As the Little Hoover Commission reported, California's present sentencing regime is a "chaotic labyrinth of [sentencing] laws with no cohesive philosophy or strategy." Ex. P3 at 35. The state's sentencing laws promote certainty in the length of sentences at the expense of public safety: Because release at a particular date is certain, offenders have little incentive to improve themselves in prison or while on parole,[81] and offenders must be released even if they pose a serious threat to the community. *Id.* at 34. In addition, sentencing judges and prison authorities have little ability to ensure that sentences and conditions of incarceration reflect the circumstances of a particular

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[81] However, according to the Commission, "incentives can be built into the existing sentencing structure to improve public safety and offender outcomes." *Id.* at 37.

crime and offender. Similarly, characteristics suggesting that the offender presents a low-risk of recidivism or would more effectively serve his sentence in a correctional setting besides prison, including the fact that the offender is elderly or infirm, cannot be considered. "[California sentencing] law treats many crimes alike, even when the circumstances of an individual case or the characteristics of the offender might warrant a different resolution that would better benefit victims and the community." *Id.* at 36. Furthermore, the present system leads to "overreliance on the most expensive sanction—state prison—instead of local correctional alternatives that could provide more effective and efficient punishment." *Id.* Finally, the "countless increases in the length of criminal sentences" over the last few decades do not reflect a coherent sentencing policy and also may not serve the state's sentencing goals. *Id.* at 33, 35, 48. Public safety is not benefitted by blindly approving of the continued incarceration of prisoners who pose little threat of committing further crimes. Like a number of other official bodies, the Little Hoover Commission recommended that a sentencing commission be established to "develop sentencing guidelines, as well as post release supervision and revocation guidelines that [would] become law unless rejected by a majority vote of the Legislature," *id.* at 48.

The establishment of a sentencing commission is but one approach to addressing the problems in the state's sentencing laws; there are undoubtedly others. Regardless of the approach adopted by the state, however, it is clear that California's sentencing regime ill-serves the state's interests, and that the overcrowding crisis in California's prisons provides an opportunity for the state to reconsider its sentencing

practices. Numerous reports have recommended sentencing reform and established that such reform would, if implemented, have a positive impact upon public safety. *See id.* at 38-42 (describing the positive public safety effects in various states of their use of a sentencing commission). Given the fact that legislative bodies tend to vote only to increase sentences and not to reduce them, however, and given the questionable nature of California's initiative process, there appears to be little or no hope of a serious review of sentencing laws or policies in the absence of some extraordinary state action.

The state might also consider changing the criminal law itself. For example, the Governor has proposed adjusting the threshold value at which certain property crimes become felonies to reflect inflation since 1982. Ex. P780 at 18 (Governor's Budget: Special Session 2008-09); Jan. 16, 2009 Sturges Decl. Ex. A at 28 (2009-10 Governor's Budget). Such a change would reclassify crimes falling below the adjusted threshold as misdemeanors. Likewise, the state might consider permitting low-risk offenders, such as the elderly or the infirm, to serve the latter portions of their sentences in community corrections facilities or on house arrest. Both of these proposals would reduce the prison population by diverting certain offenders to alternative placements rather than prison. Both have also been endorsed by state officials, a strong indication that the proposals would not have an adverse effect on public safety.

The parties introduced no evidence as to the effect on public safety of the transfer of inmates out-of-state or into federal custody, so we cannot consider those measures in detail at this time. As we have already explained, however, the out-of-state transfer program

proposed by defendants is far too small, by itself, to make more than a dent in the problem of overcrowding, and the additional resources required to monitor the medical and mental health care provided to transferred inmates could eliminate any benefits that otherwise result from such transfers. Furthermore, by moving inmates far away from their places of residence and making contact with families and friends unavailable, such transfers may reduce the inmates' prospects for rehabilitation. The transfer of undocumented aliens to federal custody might involve a larger number of inmates, but this suggestion was not sufficiently developed to permit any extended analysis of its effect upon public safety and the operation of the criminal justice system.[82]

C. *Impact of Proposed Measures on Communities*

Law enforcement and other witnesses from the communities testified that plaintiffs' proposed prisoner release order would result in an overwhelming increase in the number of crimes, arrests, and jail inmates, thus adversely affecting their ability to investigate, prosecute, and punish crime. We cannot accept their opinions, however, to the extent that they are based

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[82] The only evidence in the record on this proposal is testimony from one witness, California State Senator George Runner, that California prisons house roughly 30,000 illegal aliens, which is disproportionately high when compared to other states, and that federal reimbursement is insufficient to cover the costs of housing these inmates. Runner Trial Decl. ¶¶ 6, 19; Rep. Tr. at 2728:19-2729:12. We received no testimony on the feasibility of transferring all or even a portion of these inmates to federal custody, and no testimony regarding any potential impact on public safety or the operation of the criminal justice system of such a transfer, including whether the prisoners might be swiftly deported and just as swiftly re-cross the border into California shortly thereafter.

on the assumption that a "prisoner release order" would involve such drastic measures as a mass early release and/or a ban on the admission of new offenders to prison. We credit the concern of some witnesses, however, that resources at the community level are strained, particularly because of the current fiscal crisis. *See, e.g.*, Cogbill Trial Decl. ¶¶ 29-38 (Sonoma County Sheriff-Coroner); Boesch Trial Decl. at 8-9 (San Mateo County Assistant County Manager); Aug. 15, 2008 Graves Report at 3-4. Nonetheless, as we discuss below, the evidence demonstrates that the fears regarding increased crime, arrests, and jail populations are largely unjustified, and that there are ways to achieve a reduction in California's prison population without unduly burdening the already limited resources of local communities.

1. *Investigation and Prosecution of Crime*

Defendant-intervenors presented credible evidence that California's local law enforcement resources are currently overtaxed. There are not enough judges, prosecutors, public defenders, police officers, or resources to support their necessary work, and the situation has worsened with the economic downturn. *See, e.g.*, Rep. Tr. at 2197:5-2199:9 (Bennett); *id.* at 1856:13-21 (Word) (City of Vacaville Police Chief); Word Trial Decl. ¶ 25. The courts are severely clogged with cases and are several years behind on trials. *See* Meyer Am. Trial Decl. ¶ 43; Ryan Trial Decl. ¶ 28 (Amador County Sheriff-Coroner). Any significant increase or concentration in crime would likely further hamper investigations and prosecutions. *See, e.g.*, Ryan Trial Decl. ¶¶ 27-28; Dumanis Trial Decl. ¶ 33; Dyer Am. Report ¶ 28; Rep. Tr. at 1179:5-17 (Powers).

The population reduction measures described above, however, would not result in the significant increase in crime that many witnesses opposed to the measures believe would occur. As explained above, many witnesses wrongly assumed that this court would require a sudden mass release of one-third of California's prisoners or a ban on accepting new or returned prisoners. *See, e.g.*, Rep. Tr. at 1052:8-12 (Powers); Aug. 15, 2008 Bennett Report ¶¶ 13, 18. That approach was not proposed by any party, nor would it be approved by the court.

Many witnesses also testified that, at present, a large number of crimes are committed by parolees, *see, e.g.*, Rep. Tr. at 2331:1-8 (Dyer); parolees have a high rate of recidivism, *e.g.*, Meyer Am. Trial Decl. ¶¶ 39-40;[83] and more crimes occur than are reported to the police, *e.g.*, Rep. Tr. at 1506:21-1507:20, 1508:11-19 (Austin). The parolees who would be released early to communities under the proposed measures, however, are the ones who are least likely to commit further offenses and who along with their fellow parolees would be released in any event a few months later. Indeed, the evidence describing the criminogenic nature of the California prisons suggests that the longer an inmate remains incarcerated, the more likely he is to reoffend upon release. *See, e.g.*, Rep. Tr. at 1580:5-9 (Beard); *id.* at 2013:14-2014:1 (Lehman); Ex. P3 at 17. The relevant question for us to examine is not the absolute impact of the current population of parolees on local criminal justice systems, but the relative impact on the criminal

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[83] This testimony does not take into account that the recidivism rate for parolees is high in California in part because the state returns most technical parole violators to prison. *See* Aug. 15, 2008 Austin Report ¶ 13.

justice system of the additional parolees in the community because of the proposed population reduction order.

The evidence shows that any such impact would be small. The expanded award of good time credits proposed by Dr. Austin, for example, would result in only a temporary increase in the return of parolees to communities during the initial period of implementation. Rep. Tr. at 1408:13-21 (Austin); Aug. 15, 2008 Austin Report ¶¶ 93-94. Although the increase in parolees could result in a temporary increase in arrests during the initial period of accelerated release, these arrests would represent an increase of only approximately 0.3% during that period. Rep. Tr. at 1490:17-1491:25; *see also* Aug. 27, 2008 Austin Supp. Report at 10; Rep. Tr. at 1479:13-1480:5. Similarly, the impact of the proposed diversion of technical parole violators and low-risk offenders on the total number of arrests in each county, and statewide, would be an increase of less than 1%. *See* Aug. 27, 2008 Austin Supp. Report at 10. All of these individuals would in any event be released to the community after a fairly short period of incarceration, following their going through the churning process, in which they are subjected to criminogenic influences. Further, all of the figures noted above are consistent with the testimony described earlier that plaintiffs' proposed population reduction measures do not threaten public safety or the operation of the criminal justice system.

Any increase in the arrests of parolees resulting from the population reduction measures would actually be smaller than that calculated by Dr. Austin and by many defendant-intervenors. These witnesses assumed that prisoners released due to good

time credits or diverted to alternative sanctions would recidivate at a rate of 70% over a three-year period, the average recidivism rate for all prisoners in California. *See, e.g.*, Rep. Tr. at 2628:8-25 (Austin); Dyer Am. Report ¶ 18; Dostal Trial Decl. ¶ 14. However, if a risk assessment instrument were used to implement such measures, the CDCR would be able to identify low-risk inmates whose likelihood of recidivism would be considerably lower than that of the average inmate. Rep. Tr. at 2628:8-25 (Austin); *id.* at 2133:8-11 (Krisberg) ("If one is selecting low risk inmates, you would expect the recidivism rate would be lower because that 70 percent rate consists of people with much higher risk and people with lower risk."). According to Director Hoffman, low-risk inmates have an average recidivism rate of just 17%. Rep. Tr. at 1750:1-6. Furthermore, as we found above, it is likely that recidivism rates would begin to drop as plaintiffs' proposed measures were implemented. The proposed population reduction measures would therefore not result in a significant additional burden on the ability of law enforcement officers to investigate or prosecute crime.

2. *Effect on Jail Population*

Defendant-intervenors also presented credible evidence that California's jails are, for the most part, already overcrowded, resulting in adverse public safety and criminal justice effects. Thirty-two of California's county jails are under some type of court-ordered population cap, Rep. Tr. at 2198:3-9 (Bennett); Ex. DI-774,[84] and many that are not have inmate populations close to or above their design capacity. *E.g.*,

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[84] Many of the caps for the county jails are set at or near 100% design capacity. *See* Ex. DI-774.

Rep. Tr. at 2684:22-23, 2686:15-22 (Ryan); Boesch Trial Decl. at 12. As expected, this overcrowding—even at levels much lower than in the state prison system—has limited the counties' capacity to provide services in the jails or to maintain a safe correctional environment for the detainees, the staff, and the community. *See, e.g.*, Boesch Trial Decl. at 12; Munks Trial Decl. ¶¶ 7-9; Rep. Tr. at 2702:5-17 (Ryan); Dostal Trial Decl. ¶¶ 15, 17.

As a result of this crowding problem, counties already routinely engage in the early release of jail inmates. *See, e.g.*, Rep. Tr. 1803:23-1804:9 (Smith) (stating that in 2007, Los Angeles County released about 50,000 inmates early from its jails); Rep. Tr. at 2364:17-19 (Dyer); Rep. Tr. at 2378:13-18 (Pacheco); James Trial Decl. ¶ 19; Ingrassia Trial Decl. ¶¶ 12-13 (Sheriff's Commander assigned to San Diego County Sheriff's Detention Services Bureau). County law enforcement officials testified that any significant limit on the prison population would force them to initiate the early release of jail inmates or to expand extant early release programs to include higher-risk inmates. *See, e.g.*, Rep. Tr. at 2388:8-2391:16 (Pacheco); *id.* at 2668:7-14 (Christianson) (Stanislaus County Sheriff-Coroner); Munks Trial Decl. ¶¶ 11-12; Ingrassia Trial Decl. ¶ 12. According to these witnesses, such early releases lower the deterrence value of incarceration, increase crime, reduce incentives for offenders to participate in programming, and result in a high failure-to-appear rate for pre-trial defendants who are not incarcerated. *See, e.g.*, Aug. 15, 2008 Bennett Report ¶ 27; Rep. Tr. at 1179:18-1180:3 (Powers); *id.* at 1819:9-1821:19 (Smith).

We need not determine whether an acceleration of early release from jails would have the pernicious

effects anticipated by the law enforcement witnesses because evidence shows that any increase in parolees and probationers resulting from plaintiffs' proposed population reduction measures would not have a significant effect on the population of the county jails. These measures would adversely affect the jail population only if the additional parolees or probationers in the community were incarcerated in jail for arrests for new crimes or as a sanction for failing to complete community-based diversion programs. As Sheriff Munks of San Mateo County noted, however, only "a very, very small percentage of th[e] overcrowding [in jails] is attributable to parolees who have been arrested and returned to [the] jail." *Id.* at 1790:16-17 (Munks). Given the small adverse effect that the increase in parolees and probationers would have on the total arrests in each county, this increase is not likely to have a significant effect on the county jail population.[85] *See id.* at 1409:2-23 (Austin); *see also id.* at 1830:21-1831:23 (Smith) (population reduction order of 52,000 inmates, even when calculated using the high 67.5% recidivism rate, would result in an increase of only 20 admissions a day in the Los Angeles County jail system, which books from 300 to 1,100 inmates every day). The diversion of technical parole violators could even serve to reduce the jail population because those offenders would no longer

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[85] We reject some of the witnesses' calculations of the impact of a population reduction order on the county jails. Sheriff Munks, for example, agreed during trial that the method he used to calculate the impact of a population reduction order on the jail population was inconsistent with the county's current experience with parolees. Rep. Tr. at 1794:19-22. Sheriff-Coroner Christianson admitted that he did not know how his staff calculated the estimated impact on his jail population. *Id.* at 2680:4-7.

have to be kept in county jail pending their transfer to CDCR facilities. Aug. 15, 2008 Austin Report ¶ 88. In any event, the implementation of plaintiffs' proposed population reduction measures would not significantly exacerbate overcrowding in the various county jails.

3. *Effect on Parole Supervision Resources*

Plaintiffs' proposed population reduction measures would result in an increase in the population of parolees in the community at any given moment. Defendant-intervenors argue that the parole departments would not be able to supervise the increased number of parolees, and that inadequate supervision would lead to an increase in recidivism. They presented evidence that, even at present, parole departments are overburdened and cannot adequately supervise the parolees, leading to parolees' failure to integrate into society. *See, e.g.*, Dyer Am. Report ¶¶ 6, 32; Rep. Tr. at 1856:13-21 (Word).

The evidence shows, however, that many of the current problems with parole supervision are created by the poor allocation of resources. California's parole system is significantly out of step with that of the other states. California is the only state that puts every inmate leaving the prison system on parole, usually for one to three years. Rep. Tr. at 1756:16-22 (Hoffman); Ex. P113 at 75 (Rehabilitation Strike Team Report). "The upshot is that California's parole system is so overburdened that parolees who represent a serious public safety risk are not watched closely enough, and those who wish to go straight cannot get the help they need." Ex. P113 at 15.

The evidence conclusively showed that public safety would not be adversely affected by releasing

low-risk, nonserious, nonviolent offenders from the prison system without placing them on parole supervision. Such individuals can be identified using a risk assessment tool. *See* Rep. Tr. at 1406:6-1407:10 (Austin). Hoffman, the CDCR's Director of Adult Parole Operations, testified that "the science and evidence . . . do[ ] support a conclusion that there is a percentage of the parole population that shouldn't be supervised or supervised very little; that at the low end of the spectrum supervision is counter productive." *Id.* at 1758:6-10. Secretary Woodford also opined that reducing the supervision of low-risk offenders would reduce recidivism and crime, *see id.* at 1323:9-24 (Woodford), and the Rehabilitation Strike Team's report reached the same conclusion, Ex. P113 at 15-17. Most of the states in the country do not supervise low-risk offenders at all. Rep. Tr. at 1759:23-1760:7 (Hoffman).

Parole could also be shortened to one year for those who comply with their terms of release and meet certain other criteria. This "earned discharge" strategy for parolees would provide incentives for parolees to conform to their parole supervision requirements or to participate in programming. Ex. P2 at 13 (CDCR Expert Panel Report); Ex. P113 at 82-84 (Rehabilitation Strike Team Report); Ex. P600 at CDCR015633 (CDCR Division of Adult Parole Operations, "White Paper: Earned Discharge"); *see also* Aug. 15, 2008 Austin Report ¶ 53. At the same time, it would not adversely affect recidivism because there is no proven relationship between time on parole and recidivism. Aug. 15, 2008 Austin Report ¶ 77. It would also allow the CDCR to reallocate resources to moderate-and high-risk offenders "who require, and benefit from, improved supervision and evidence based programming." Ex. P600 at CDCR015633. Such strategies

have been successful across the nation in lowering recidivism rates. *Id.* Both the Governor's Rehabilitation Strike Team and the CDCR Expert Panel recommended implementing the earned discharge strategy for parolees as a way to improve the parole system and reduce recidivism. Ex. P2 at 13; Ex. P113 at 16-17.

Based on this evidence, we find that shortening the length of parole or limiting the use of parole for certain offenders would ease the present burden on the parole system. These reform efforts would also improve the public safety impact of the parole system by concentrating resources on high-risk offenders who need supervision and by offering incentives to all offenders to participate in rehabilitative programming.

Both Dr. Austin and the CDCR Expert Panel included parole reform along the lines described above in their packages of measures to reduce the prison population without adversely affecting public safety or the operation of the criminal justice system. We find their recommendations persuasive, and conclude that the implementation of parole reform—which is already in progress—would allow local parole systems to safely absorb any increase in the number of parolees resulting from the proposed population reduction measures.

4. *Impact on Community Corrections, Rehabilitative Services, and Re-entry Programs*

Defendant-intervenors also argued that the influx of parolees and probationers in communities as a result of plaintiffs' proposed population reduction measures would strain the community corrections system, rehabilitative services, and re-entry programs.

They presented evidence that there are not enough community correctional resources to supervise or provide services to offenders who are diverted from the prison system to the communities.[86] *E.g.*, Rep. Tr. at 2384:3-14 (Pacheco); *id.* at 1030:3-21 (Powers); Cogbill Trial Aff. ¶¶ 35-36. The caseload for probation officers in Los Angeles County, for example, is upwards of 1000:1, while the recommended caseload is between 30:1 and 50:1. Dalton Am. Trial Decl. ¶ 32; *see also* Meyer Am. Trial Decl. ¶¶ 18, 20. Many cases are largely unsupervised, so that the officers can focus on cases that require more intense supervision or on emergency situations. *E.g.*, Meyer Am. Trial Decl. ¶¶ 20, 24; Rep. Tr. at 1030:7-21 (Powers).

Defendant-intervenors also presented evidence that both diverted offenders and offenders coming out of California's prisons and reentering the communities have significant needs in the areas of mental health, substance abuse treatment, other medical services, family services, employment, and housing. *See, e.g.*, Cogbill Trial Decl. ¶ 29; Dalton Am. Trial Decl. ¶¶ 30-31; Johnson Trial Decl. ¶ 2 (Director of San Mateo County Human Services Agency); Oct. 16, 2008 Bennett Supp. Report at 2-4; Ex. DI-218 at 1 (Report of the Re-Entry Policy Council). Evidence shows that counties lack the resources to meet those needs even now. *See* Rep. Tr. at 2073:15-2074:14 (Conklin) (San Diego County Sheriff's Department Detentions Chief Mental Health Clinician); *id.* at 2456:7-14 (Pena) (Santa Clara County Director of

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[86] The increase in the population of probationers would not occur as a result of the expansion of earned credits or the diversion of technical parole violators. It would occur only if the state decides to reduce the prison population by diverting low-risk offenders to probation.

Mental Health); *id.* at 2492:13-22 (Garner); *id.* at 2511:25-2512:5 (Bataille) (defendants' expert); Aug. 15, 2008 Graves Report at 5-6; Cogbill Trial Decl. ¶ 7; Pena Trial Decl. ¶¶ 11, 15; Aug. 15, 2008 Pena Report at 3-5; Word Trial Decl. ¶ 26; James Trial Decl. ¶ 34.[87] The gap between the needs and availability of services contributes to the high level of recidivism among parolees. Cogbill Trial Decl. ¶ 7.

Because the community re-entry and rehabilitation services in most counties, if not all, are inadequate to serve the current population, those released into the communities as a result of the proposed population reduction measures would either not receive services in the community promptly or would displace other people who are currently receiving services. *See* Rep. Tr. at 2495:5-13 (Garner); *id.* at 2699:23-2700:3 (Ryan). Such a result could be mitigated, however, through a population reduction plan that created only a gradual increase in the number of parolees or probationers in each county. Moreover, the increased needs in each county resulting from the population reduction measures proposed by plaintiffs are likely to fall within normal fluctuations in the number of people served by the counties. *See, e.g.*, Rep. Tr. at 2442:2-8 (Pena) (stating that the Santa Clara mental health system serves a dynamic population of between 17,000 and 19,000 clients each year); Pena

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[87] Although community public mental health programs are not intended to serve parolees, Rep. Tr. at 2550:9-19 (Bataille), parolees still rely on county services at times. *See, e.g., id.* at 2432:16-22 (Pena) (testifying that in Santa Clara, approximately 60% of parolees receiving state outpatient services also accessed county services); *id.* at 2550:24-25 (Bataille) (testifying that county systems still triage parolees in need of psychiatric emergency services).

Trial Decl. ¶ 18 (estimating that the proposed population reduction order would result in an additional 100 to 700 individuals in Santa Clara County needing mental health services).

Furthermore, overwhelming evidence establishes that diversion would be successful and that the proposed population reduction measures would have no adverse effect—and would in fact improve public safety—if the state were to divert some portion of the savings generated by the population reduction to community corrections, rehabilitation, and re-entry resources. *See, e.g.*, Rep. Tr. at 1828:2-19 (Smith) (opining that his concerns would be ameliorated if the state redirected funding to the counties); *id.* at 1573:1-1574:3 (Beard) (testifying that funding community services could compensate for the 0.3% increase in arrests of parolees). The programs are already in place, and better coordination between the state and the counties, alongside additional funding, could make these services available to a larger portion of the population. *See, e.g.*, Aug. 15, 2008 Garner Report at 6; Meyer Am. Trial Decl. ¶ 69. In any event, as noted already, the additional demand for community resources created by a population reduction is likely to fall within existing fluctuations in demand, and thus would not result in any significant changes at the county or local level.

We have no question that the entire criminal justice system and the state itself, as well as the local communities, would be well-served if the state would help fund some of the county programs that are designed to help parolees, probationers, and other persons convicted of criminal offenses with problems such as drug and alcohol addiction, mental illness, job training, and rehabilitation generally. Such pro-

grams would certainly help to reduce the crime rate and make the local communities safer places in which to live. Whether to do so, however, is a question as to how the state wishes to expend its resources that must be answered by the state's elected officials and not by this court. We can only note that should the officeholders of California and their constituents wish to raise the level of safety of the state's communities by increasing the availability of programs that facilitate the orderly re-entry into society by former prisoners, they are free to appropriate the necessary funds to do so in a manner that will not divert such funds from other important societal needs. There is no bar to the people's financing of projects they deem desirable through new tax revenues or the issuance of additional state bonds.

5. *Impact on Integrity of Criminal Justice System*

David Bennett, a criminal justice consultant and expert witness for Defendant-Intervenor Sonoma County, opined that "[t]he closing of the front door to the prisons and resulting jail overcrowding, combined with a reduced capacity to locally sentence lower level offenders (such as misdemeanants) will *compromise the criminal justice system's ability to hold offenders accountable*." Aug. 15, 2008 Bennett Report ¶ 30 (emphasis in original). He anticipated that this would result in a loss of system integrity because, among other negative effects, offenders would not be held accountable for criminal behavior, district attorneys might stop prosecuting certain crimes, and judges might modify sentences to accommodate the overcrowding in jails. *Id.* ¶¶ 35-37.

Bennett's opinion was based on the assumption that a population reduction order would involve closing the front door of the prisons. *Id.* ¶ 30. None of the

measures proposed by plaintiffs or considered here would require such an extreme result. Moreover, as illustrated above, the measures would not result in a loss of deterrence or cause an increase in jail overcrowding; they would simply affect where offenders serve their sentences and whether they might be released a few months earlier, with no effect on the state's ability or incentive to arrest, prosecute, or imprison new offenders. We thus find that a prison population reduction could be achieved without the negative impact on the integrity of the criminal justice system predicted by Bennett.

6. *Weight To Be Given Public Safety*

As demonstrated above, we have given substantial weight to the question of the effect of our order upon public safety and the operation of the criminal justice system. While we conclude that there is no adverse effect, were we in error and were there in fact some adverse effect, it would be small, given the number and types of individuals to be released early or diverted to non-prison settings, and given the number of counties, and the size of the state and its population. Even considering the possibility of a minor adverse effect, we would, in view of the extremely serious injuries that continue to result from the long-standing constitutional violations at issue, be required to grant (with the modification set forth in our order) the relief that plaintiffs seek.

D. *Feasibility Notwithstanding the Present Fiscal Crisis*

In concluding that the plaintiffs' proposed population reduction measures could safely reduce the population of California's prisons, and that such a

reduction would not have a significant adverse effect in California's communities, we do not ignore the state's current economic difficulties. The fiscal crisis does not, however, alter our conclusions.

There will be a substantial fiscal savings to the state as a result of the reduction in the size of the prison population. According to Deputy Cabinet Secretary Robert Gore, the approximate cost of housing a prisoner is $43,000 per year. Ex. P163 at DEFS036906 (Jan. 10, 2008 Mem. from Robert Gore re: Governor's CDCR Rehabilitation Strike Team Final Report). Under the order establishing a population cap, the size of the prison population will be reduced by approximately 46,000. The changes leading to that reduction recommended by plaintiffs, such as an increase in good time credits followed by early release, diverting technical parole violators and modifying parole requirements, and diverting low-risk offenders with short sentences, involve no fiscal cost. Other changes recommended by various state commissions and committees can also be adopted without any state funding. There are other state actions that all agree would help reduce crime significantly on both a short-and a long-term basis if taken along with the prisoner reduction measures. They involve helping fund community re-entry programs, such as drug and alcohol treatment, job training, mental health therapy, and half-way houses. Although California's prison population could be reduced without adopting or strengthening such local programs, the benefit to the state of investing in them would be considerable. Whether or not to make such an investment, however, is, as we observed previously, a matter for state officials, not the court, to decide. In any event, the present fiscal crisis would be alleviated rather than worsened by a prisoner release order.

E. *Inclusion of Mentally Ill Inmates in Any Population Reduction Order*

The state has suggested that, should we issue a population reduction order, we should nonetheless exempt seriously mentally ill inmates from release pursuant to our order. However, there is no public safety reason to treat mentally ill inmates differently from other inmates as a categorical matter.

Under the current system, mentally ill inmates are regularly released when their prison sentences end. Although these inmates reportedly have higher recidivism rates than non-mentally ill inmates, evidence shows that mentally ill inmates who are released do not, by virtue of their mental illness, present any higher risk than other released inmates. Much of the high recidivism is attributable to noncompliance with parole conditions related to the disorganization produced by mental illness. Ex. P715 at 5 (July 2007 CDCR Division of Adult Parole Operations report entitled "Mentally Ill Parolee Population"). Dr. Gilligan, a psychiatrist and an expert on mentally ill offenders, testified that, based on research throughout the United States and also in California specifically, mentally ill parolees are not more likely to commit violent crimes after discharge than are non-mentally ill parolees. Aug. 15, 2008 Gilligan Report ¶¶ 34, 36-39; Rep. Tr. at 1608:12-25 (Gilligan). Rather, the risk factors for violence, such as substance abuse, family dysfunction, and character disorders, are comparable for the mentally ill and non-mentally ill. Aug. 15, 2008 Gilligan Report ¶ 40. Defendants' expert Dr. Packer agreed that "the research literature does not suggest that mentally ill offenders pose a higher risk of violence than their non-mentally ill counterparts." Oct. 1, 2008 Packer Addendum at 1. Another

expert for defendants Gale Bataille, the former director of the of [sic] Behavioral Health and Recovery Services for San Mateo County, testified that mental illness has a high rate of co-occurrence with substance abuse, which is a predictor of violence, but agreed that mental illness by itself is not a significant indicator of violence. Bataille Rebuttal Report at 2; Rep. Tr. at 2514:6-20; *see also* Oct. 1, 2008 Packer Addendum at 2 (stating that "mental illness is a risk factor for violence, particularly if the individual also abuses substances and has acute psychotic symptoms," but opining that "[t]his does *not* mean that mentally ill inmates should, by virtue of their mental illness, be considered higher risk than other inmates" (emphasis in original)).

The testimony from the mental health care experts was unanimous that mentally ill people who are receiving proper mental health treatment pose no greater risk to the community than those who are not mentally ill. Rep. Tr. at 2209:25-2210:23 (Stewart); Oct. 1, 2008 Packer Addendum at 1-2; Rep. Tr. at 1640:4-10 (Gilligan); Bataille Rebuttal Report at 2; *see also* Ex. DI-219 at 6 (June 2006 UCLA Integrated Substance Abuse Program Neuropsychiatric Institute report entitled "Final Report on the Mental Health Services Continuum Program of the California Department of Corrections and Rehabilitation-Parole Division"). Therefore, population reduction measures involving the successful diversion of offenders and technical parole violators to community mental health programs instead of prison would not have a negative impact on public safety. The diversion of mentally ill technical parole violators might even improve public safety because the current churning of mentally ill parole violators in and out of crowded prison reception centers is especially disruptive to their treatment

needs and re-entry success. Aug. 15, 2008 Gilligan Report ¶¶ 32-33; Aug. 15, 2008 Stewart Supp. Report ¶ 136.

Numerous witnesses for defendants supported the diversion of mentally ill offenders. Dr. Packer, defendants' mental health expert, did not support the mass early release of the mentally ill but recommended diversion of mentally ill offenders to community-based programs as an effective population reduction measure. Rep. Tr. at 1086:15-1087:22. Director Bataille also supported community diversion. *See* Aug. 15, 2008 Bataille Prelim. Report at 19. Director Hoffman testified that the CDCR has, consistent with public safety, already stopped returning parolees to custody for technical violations resulting from their mental illness when programs are available. Rep. Tr. at 1766:15-1767:19; Hoffman Trial Aff. ¶ 29; Ex. D1195 (Jan. 12, 2007 Mem. from CDCR Secretary James E. Tilton to the Division of Adult Parole Operations). He also stated that, like all other parolees, mentally ill parole violators can be given intermediate sanctions using the "Parole Violation Decision Making Instrument." Hoffman Trial Aff. ¶ 30.

The disagreement among the experts centered not on whether diversion would be harmful to public safety, but on whether California's communities had sufficient community mental health programs to support the early release or diversion of mentally ill parolees. Plaintiffs' experts testified that the impact of the inclusion of some *Coleman* class members in the population reduction measures would not be significant. Dr. Stewart calculated that, assuming a reduction in the prison population by 50,000 inmates, there would be about 10,000 more *Coleman* class members in the community over a period of time. Out

of that group, about 8,500 people would be at the CCCMS level and would need minimal care in the community. Rep. Tr. at 2211:3-15. About 650 additional people per year would need enhanced outpatient care, but that would not pose a significant burden on the current system, which serves 69,000 people. *Id.* at 2211:18-2212:7. Finally, only 100 additional people each year would need DMH-level care, which would not be a significant additional burden on a system that currently treats 43,000 people annually. *Id.* at 2212:8-21. Dr. Stewart also testified that the number of people needing care may be lower because the class members' mental health conditions would improve once they left prison. *id.* at 2211:18-2212:21; *see also* Aug. 27, 2008 Gilligan Rebuttal Report ¶¶ 10-11.

Defendants' experts contested these numbers and their significance. Dr. Packer stated that it is not necessarily true that mentally ill inmates will do better outside of prisons and opined that it is more common for some mentally ill individuals to function at a higher level while in prison. Oct. 1, 2008 Packer Addendum at 3. Dr. Packer also testified that elements for successful release—pre-release planning, coordination with community providers, access to systems of care in the community, and availability of community programs—are not currently fully functioning within the CDCR, and that an accelerated release of mentally ill prisoners would exacerbate those problems. *Id.* at 2. Director Bataille opined that most California communities are not prepared for, or capable of, providing the community mental health and treatment services necessary to support an accelerated release of mentally ill inmates, and that the problem is not only funding but also a lack of trained professional staff. *See* Aug. 15, 2008 Bataille Prelim. Report at 5-18. Other witnesses testified that counties are unable

to serve their mentally ill populations now. *See, e.g.*, Rep. Tr. at 2456:7-17 (Pena); Dalton Trial Decl. ¶ 31; Conklin Trial Decl. ¶ 41; Meyer Am. Trial Decl. ¶¶ 64-65.

We credit the testimony that community mental health programs are overburdened in many, if not most, California communities. Still, the *Coleman* class may safely be included in the state's population reduction measures in any number of ways. For example, as Director Bataille suggested, a diversion or earned credits program could be structured so that only those mentally ill individuals with the greatest level of psychiatric stability and the greatest potential to "voluntarily" follow up on outpatient care would be eligible, at least until appropriate community programming is in place. Aug. 15, 2008 Bataille Prelim. Report at 4.

Moreover, credible evidence demonstrates that treating mentally ill offenders outside prison is more effective and less costly than treating them in prison. *See* Gilligan Rebuttal Report ¶ 11 (stating that "mental health treatment in the community is more likely to be successful and effective than similar treatment would be in the social environment of the prison"); Rep. Tr. at 1747:9-16, 1753:24-1755:5 (Hoffman) (affirming that providing mental health care for parolees is cheaper than providing it for inmates); *id.* at 2450:14-2451:7 (Pena) (acknowledging that it costs about $24,000 less per year to provide a therapeutic bed in the community than to incarcerate a mentally ill person). There was also unrebutted testimony that it is easier to recruit and hire qualified mental health professionals in civil hospital and clinic settings than in prisons. Aug. 27, 2008 Gilligan Rebuttal Report ¶ 17. In light of the abysmal qualify of the mental

health care presently available to California's inmates, it is unlikely that any mentally ill inmates released by the state will find their mental health treatment seriously compromised by their release from prison.

We recognize that expanding community programming would require an increase in professional staff at the community level; however, as with other types of programming, this would require a shift in, rather than an infusion of, resources. The state has already begun to expand parolee services, *see* Hoffman Trial Aff. ¶ 32, and also has a roadmap for further expansion of programming in the CDCR Expert Panel Report. Defendants' expert Director Bataille agreed that a population reduction could be achieved and sustained by following the recommendations contained in the CDCR Expert Panel Report, including its recommendation for expanding the communities' capacity to provide programming. Aug. 15, 2008 Bataille Prelim. Report at 19. Collaboration between the mental health and criminal justice systems could also begin to address the resource gap. *See* Rep. Tr. at 2534:7-2535:11 (Bataille).

On the basis of this evidence, we conclude that mentally ill inmates could, under appropriate conditions, be included in the proposed population reduction measures without any adverse effect on public safety or the operation of the criminal justice system.

F. *Empirical Evidence on Incarceration and Crime Rates*

We acknowledge the concern of some law enforcement officials that incarceration serves the interest of incapacitation over the life of a repeat offender. *See, e.g., id.* at 1181:5-13 (Powers). To that extent, there is likely some correlation between incarceration rates

and crime rates. Indeed, according to plaintiffs' experts, some studies have concluded that every ten percent increase in the incarceration rate results in a two to four percent decrease in the crime rate, *id.* at 1582:1-3 (Beard); *id.* at 2032:4-12 (Lehman), and that massive incarceration rates have contributed to a 25% reduction in violent crime across the United States, *id.* at 1447:18-1450:23 (Austin).

This testimony does not, however, persuade us that California's prison population could not be reduced without adversely affecting public safety.[88] First, even if we credit these studies, population reduction measures could still have a net positive impact on the crime rate. For example, defendants introduced Exhibit D1331, a report by the Washington State Institute for Public Policy, for the proposition that incarceration rates and crime rates correlate. *See* Rep. Tr.2030:14-2032:12 (questioning of Dr. Lehman by defendants' counsel and related colloquy with the court). That same report, however, concluded that the decrease in recidivism resulting from an expansion of evidence-based programming would outweigh any potential adverse impact on crime rates resulting from decreased incarceration rates. *See* Ex. D1331 at 15.

Second, the evidence supported Dr. Austin's testimony that there is still disagreement as to the validity of the research connecting incarceration rates to

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[88] We also note that the same studies referred to by plaintiffs' experts found that increasing the incarceration rate becomes counterproductive once the incarceration rate reaches a certain inflection point. *E.g.*, Rep. Tr. at 1582:1-13 (Beard); *see also id.* at 1447:18-1450:23 (Austin). At its present incarceration rate of 470 per 100,000, California is close to the inflection point at which further incarceration would not be productive. *Id.* at 1582:1-13 (Beard).

crime rates, Rep. Tr. at 1450:20-23, and that "[r]esearch on crime and incarceration does not consistently indicate that the massive use of incarceration has reduced crime rates," Aug. 15, 2008 Austin Report ¶ 20. In fact, with regard to the relationship between incarceration and crime in California, both defendants' expert Dr. Marquart and Professor Petersilia concluded that the decline in violent crime in California in the past decade "is not likely to be a function of the state's approach to corrections." Rep. Tr.2001:9-2002:18 (Marquart) (agreeing that "it would be a mistake to conclude that the decline in the California crime rate is a result of its incarceration policies"); Ex. P5 at 2. As we have already noted, it is likely that "[t]he overwhelming and undisputed negative side effects of incarceration and crowding far outweigh the potential, unproven benefits of incarceration" in California. Aug. 15, 2008 Austin Report ¶ 23.

Moreover, Dr. Austin and Dr. Krisberg testified that the historical data and empirical research regarding early release programs across the country show no significant relationship between crime rates and early releases. Aug. 15, 2008 Austin Report ¶¶ 19, 27-42; Rep. Tr. at 2159:20-2162:7 (Krisberg); *see also* Ex. DI-204 at 1. Their testimony, like that of Dr. Beard and Secretary Lehman, who both implemented prison population reduction measures in other prison systems, confirms that it is possible to lower the prison population without an adverse impact on crime or public safety. For example, in Washington, the state legislature prohibited sending technical parole violators to prison, instituted graduated sanctions, and expanded good time credits. Rep. Tr. at 2004:24-2005:14, 2006:23-2007:18 (Lehman). Secretary Lehman, the former secretary of corrections in Washington, testified that these measures did not have any "dele-

terious effect on crime" or public safety. *Id.* at 2008: 18-2009:14.

Secretary Lehman further testified that, during his tenure as secretary of corrections in Pennsylvania, sentencing reforms that made it more likely for an offender to be diverted into the community did not have any adverse impact on public safety. *Id.* at 2007:19-2008:24. Dr. Beard, the current secretary of corrections in Pennsylvania, testified that he had "spent a lot of time in the last seven years studying what other states have done and looking for ways that we can better manage our population from a public safety perspective, from a population control perspective, and from a cost perspective." *Id.* at 1552:19-24. He played a role in passing legislation in Pennsylvania that allowed for, among other things, intermediate punishment instead of incarceration, incentive credits for evidence-based programming, and parole reform. *Id.* at 1549:10-1550:14, 1552:1-18. Rather than having an adverse impact, these reform measures have served to improve public safety. *Id.* at 1552:19-1553:3.

Dr. Austin—who has thirty years of experience in correctional planning and research and has personally worked with correctional systems in eight states to reduce their prisoner populations, Nov. 9, 2007 Austin Report ¶¶ 2, 5—similarly testified that a number of population reduction measures have been adopted in various states without an adverse impact on public safety: diversion of technical violators in Kansas and Washington, Rep. Tr. at 1392:21-1393:5, 1399:11-15; good time credits in Illinois,[89] Nevada,

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[89] Dr. Austin's report regarding Illinois stated his opinion that early release should only be used as a short-term measure for prison overcrowding. Ex. DI-785 at 3614 (James Austin,

Maryland, and Indiana, *id.* at 1398:11-1399:1, 1399:11-15;[90] and implementation of "large community corrections diversion programs" in Ohio and Michigan, where "the state basically is paying the counties to hold people at the county level who otherwise would go to prison," *id.* at 1399:5-15. In Nevada, the legislature expanded the award of good time credits to prisoners, probationers, and parolees in 2007, which reduced the prison population without any known increase in crime, arrests, or court filings as of July 2008. Aug. 15, 2008 Austin Report ¶ 36. In New York, the prison population decreased due in part to the expansion of programs awarding good time credits, and not only did the crime rate not increase, it "declined substantially." *Id.* ¶¶ 27-28.

Dr. Krisberg also reviewed empirical research analyzing early release programs over the past twenty years in Canada, California, Washington, Wisconsin, Illinois, Texas, Colorado, Montana, Michigan, and Florida, and found that such programs do not endanger public safety. Sept. 8, 2008 Krisberg Report at 4-5. Dr. Krisberg reported that early release

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Using Early Release to Relieve Prison Crowding: A Dilemma for Public Policy, 32 Crime Delinquency 404 (1986)). Nonetheless, the article concluded that there was an overall cost savings to the state as a result of early release, with "relatively lower costs to local public criminal justice agencies stemming from arrests of the early releases." *Id.* at 3700. This is not inconsistent with Dr. Austin's testimony in this case.

[90] Although Dr. Austin stated that he did not endorse early release as a long-term remedy, Rep. Tr. 2610:8-2611:1, it was not clear whether his testimony on that point related to the expansion of good time credits or generic release. In any event, he testified that the prison population could be lowered safely through the expansion of good time credits and other measures. Aug. 15, 2008 Austin Report ¶ 43.

produced lower recidivism rates for released inmates when the release targeted low-risk offenders and made provisions for community-based supportive services. *Id.*

District Attorney Pacheco of Riverside County opined that a generic early release program from California prisons would increase crime, as it had in other jurisdictions like Florida, Illinois, Philadelphia, and Los Angeles. Rep. Tr. at 2380:20-2381:9. His opinion, however, appeared to be based largely on newspaper articles reporting specific crimes that occurred during the early release period, and not on a broader analysis of crime rates. *See* Pacheco Decl. ¶ 23 & Ex. C. Moreover, Mr. Pacheco discussed only a generic early release and failed to consider whether some of the adverse impacts he fears would be mitigated by basing early release decisions on an improved system of earned credits or by instituting a diversion program or other measures proposed by plaintiffs. *See* Rep. Tr. at 2379:17-23 (discussing only generic early release).

Dr. Marquart, defendants' sole witness on population reduction measures and public safety, stated that he opposed any prisoner release order in part because the early release measures implemented in Texas in the 1980s to meet a 95% population cap caused an increase in crime.[91] *Id.* at 1956:14-20, 23-24, 1957:12-18. However, he also testified that he did not know how much of the increase in crime was

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[91] Neither the number of inmates who were released early nor the length of time by which their incarceration was shortened is apparent from Dr. Marquart's testimony. Dr. Austin, however, stated that his recommended amount of good time credits is less than the amount awarded to Texas prisoners between 1980 and 1989, and the amount presently awarded in that state. Aug. 27, 2008 Austin Supp. Report ¶ 20(e).

attributable to the early release program, as opposed to other factors. *Id.* at 1984:16-1985:9. Indeed, the basis for Dr. Marquart's opposition to any reduction in the prison population appeared to be not the Texas experience but, instead, his opinion that he "didn't know what the consequences would be, not that it would be a disaster," *id.* at 1990:22-24. According to Dr. Marquart, reducing the prison population could have a negative impact on public safety, it could have no impact, or it could have a positive impact. *Compare id.* at 1990:17-24; *with id.* at 1995:8-20. Such equivocal testimony is not helpful to the court. In any event, Dr. Marquart stated that he was not opposed to the expansion of good time credits, parole reform, or evidence-based programming, and further stated that the prison population could be reduced in a safe manner through proper programming. *Id.* at 1991:22-1993:18, 1994:17-25. The Texas prison population, in fact, has recently been reduced safely by diverting technical parole violators and increasing the state's parole grant rate using risk-based guidelines. Aug. 27, 2008 Austin Supp. Report ¶ 20.

To the extent that District Attorney Pacheco, Dr. Marquart, or any other witness opined that *any* population reduction measure applied to California prisons would result in an adverse public safety impact, we reject that opinion. If anything, such testimony shows only that the CDCR should implement population reduction measures mirroring those of the jurisdictions that have successfully and safely reduced their inmate populations. We credit the testimony from experts who, through careful study and experience in a number of jurisdictions, arrived at the opinion that a population reduction, through a combination of earned credits, parole reform, and diversion, could be accomplished in a manner that preserves public safety

and the operation of the criminal justice system. Moreover, California's present system of churning inmates into and out of overcrowded and criminogenic prisons itself poses a threat to public safety. Thus, any increase in the crime rate associated with lowered incarceration rates could be substantially offset, and perhaps entirely eliminated, by the public safety benefits of ridding the system of churning and reducing the criminogenic effect of spending time in California prisons.

G. *Findings and Conclusions*

We take seriously our duty to consider public safety, and we have done so. We do not construe this PLRA requirement, however, to preclude a population reduction order based on a possibility that the order *might* have an adverse impact on public safety or the operation of the criminal justice system, no matter how small. If that were enough to prevent the court from ordering a population cap, no court would ever be able to impose such a remedy, thus contravening the congressional intent that a population cap be ordered if "it is truly necessary to prevent an actual violation of a prisoner's federal rights." H.R. Rep. No. 104-21, at 25.

Based on our detailed findings examining the evidence from correctional and public safety experts around the state and across the country, we are confident that a prison population reduction to 137.5% design capacity can be achieved in California without a meaningful adverse impact on public safety or the operation of the criminal justice system.[92] The evi-

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[92] *Duran*, 760 F.2d 756, a pre-PLRA case, does not suggest a different outcome. In *Duran*, the court of appeals vacated the district court's order directing the release of pretrial detainees

dence and testimony from plaintiffs, defendants, and defendant-intervenors overwhelmingly showed that there are ways for California to reduce its prison population without such an adverse impact, and that a less crowded prison system would in fact benefit public safety and the proper operation of the criminal justice system.

The population reduction measures that we specifically considered include the expansion of earned credits, the diversion of technical parole violators, the diversion of low-risk offenders to community corrections, and the expansion of evidence-based programming. These measures were recommended not only by plaintiffs' experts but also by experts for defendants and defendant-intervenors, the Governor, CDCR officials, and the CDCR Expert Panel. Because these measures either have no impact on or reduce the recidivism rate, they would not adversely affect public safety. Furthermore, unlike measures such as indiscriminately and suddenly releasing inmates or closing prison doors to further admission, the measures we considered would not have a significant adverse impact on the operation of the criminal justice system. Any adverse impact on community resources resulting from these measures could readily be mitigated by parole reform and the reallocation of

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after finding that the order would adversely affect the public interest. *Duran* involved the release of detainees without the use of any risk-based instrument, and the uncontested evidence before that court showed that many of the released inmates would become fugitives or commit felonies while awaiting trial. *See id.* at 757-58. By contrast, the evidence before this court establishes that California could reduce its prison population without any adverse effect on public safety or the operation of the criminal justice system. Accordingly, the balance of interests in this case differs substantially from that in *Duran*.

funding and resources. It follows from the many reports we have discussed that other methods of reducing the prison population such as sentencing reform and the release of members of groups that are least likely to recidivate, such as the aged and the infirm as well as low-risk prisoners nearing the end of their sentences, do not pose any threat to public safety.

Other jurisdictions have successfully reduced their prison populations through measures similar to those proposed by plaintiffs and the other reforms discussed herein, and we find that California could also do so. In fact, California could do so perhaps more easily than other jurisdictions because of its current, unproductive incarceration policies, such as returning most technical parole violators to prison and denying judges the ability to tailor sentences to the risks and needs of particular offenders.

One of the most persuasive pieces of evidence before us is the report of the Expert Panel on Adult Offender Recidivism Reduction Programming, which was convened by the CDCR in 2007 to suggest strategies for reducing California's high recidivism rate. Ex. P2 at vii. The panel consisted of CDCR's Chief Deputy Secretary for Adult Programs, academic researchers, consultants, and former and current secretaries of corrections in Pennsylvania, Arizona, Washington, Ohio, and Maine. *Id.* at ii. The report recommended a comprehensive set of measures that would reduce California's prison population while also reducing recidivism.

The CDCR Expert Panel concluded that, if the CDCR were to follow its recommendations to divert technical parole violators, implement parole reform, and expand good time credits, these changes alone

would serve to reduce the prison population by between 38,500 and 43,500 inmates, and the parole population would be reduced by 6,500 to 11,500. *Id.* at 95. The panel expected an additional reduction in the prison population of about 2,194 to 4,388 from evidence-based programming initiatives. *Id.* at 97.[93] After accounting for the costs of the additional programming recommended by the panel, full implementation of its recommendations would still save the state between $561 and $684 million a year.[94] *Id.* at 99. The proposed reduction resulting from the above measures alone would fall within the range necessary to comply with a 137.5% population cap. Other means suggested by the state and others, including the expert committees and the numerous other official committees, could reduce the prison population even further.

Secretary Lehman, who was a member of the CDCR Expert Panel, testified that use of the measures proposed in the Panel report could reduce California's prison population without causing any adverse impact. Rep. Tr. at 2012:20-25. Secretary Woodford and Dr. Austin testified that it is possible to reach 130% design capacity without adversely impacting public safety. *Id.* at 1321:19-1322:5 (Woodford); *id.* at

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[93] As of August 27, 2008, the CDCR was housing 156,352 inmates in prison institutions designed to hold 79,828 inmates. Ex. P135 (CDCR weekly population report as of August 27, 2008).

[94] James Tilton, then the CDCR Secretary, endorsed the CDCR Expert Panel's recommendations, but with a reservation as to the estimated impact on the prison population. Rep. Tr. at 2614:20-2615:2 (Austin); Ex. P49 (Sept. 25, 2007 Letter from Secretary James E. Tilton, California Department of Corrections and Rehabilitation, to the Hon. Denise Ducheny).

1384:3-12 (Austin). Dr. Austin called this a "moderate" reduction in the state's prison population, because California "has got this big bulge" of unnecessary and unproductive incarceration, which is "an easier target" for reduction. *Id.* at 1434:9-1435:4. Although Dr. Austin recommended that, to achieve a reduction of 50,000 prisoners, California should change its sentencing laws so that second strikers serve 65% to 70% of their sentences rather than 80% as required currently, *id.* at 1436:18-20, 2568:2-3, he also stated that there are other ways to achieve that reduction, *id.* at 2570:14-25, a reduction somewhat larger than that which we order.

Next, some law enforcement officials testified that the prison population could be reduced safely by about 30%—approximately the same size reduction we order here—simply by offering incentives for the communities to expand their local correctional systems. *Id.* at 2771:4-10 (Meyer); *see also id.* at 1042:4-14 (Powers). Their opinion was based on the state's experience in the 1960s, when the state paid counties to reduce the number of people being sent to prison, and the counties were able to achieve a 30% general reduction in the state prison population through the expansion of community-level programming and probation resources. *See id.* at 1042:4-14 (Powers).

We should note finally that, regardless of the conclusion of the overwhelming majority of the experts that adoption of the population control measures described above would not adversely affect public safety, they all strongly recommend that the state, in addition to strengthening its own rehabilitative programs, should help establish or improve local community programs designed to assist probationers,

parolees, and released prisoners (whether released as the result of the expiration of their terms or otherwise) to re-enter society. Such programs, as noted earlier, should include drug and alcohol rehabilitation, mental health treatment, and job training.

There is no doubt that the adoption of these programs would help increase public safety above its current level, including after issuance of our population reduction order. Clearly, a failure by the state to comply with the experts' recommendations to take these steps would be regrettable and would be contrary to the interests of public safety. Still, unlike the population cap we order here, which our analysis shows is required by the United States Constitution, the decision whether to adopt these rehabilitative measures is left to the Governor and the Legislature. Whether a failure to adopt them would be acceptable, in view of the effect on public safety, is a question that ultimately the people of California will be required to answer.

In sum, the four recommendations in the CDCR Expert Panel report adopted as proposals by plaintiffs provide a means for the state to safely reduce the prison population to 137.5% design capacity. The population could be reduced even further with the reform of California's antiquated sentencing policies and other related changes to the laws. We are therefore satisfied that the state has available methods by which it could readily reduce the prison population to 137.5% design capacity or less without an adverse impact on public safety or the operation of the criminal justice system. Accordingly, even after giving "substantial weight to any [potential] adverse impact on public safety or the operation of a criminal justice system caused by" our population reduction order, 18

U.S.C. § 3626(a)(1)(A), we conclude that our order meets the requirements of the PLRA.

VIII. CONCLUSION

The massive 750% increase in the California prison population since the mid-1970s is the result of political decisions made over three decades, including the shift to inflexible determinate sentencing and the passage of harsh mandatory minimum and three-strikes laws, as well as the state's counterproductive parole system. Unfortunately, as California's prison population has grown, California's political decision-makers have failed to provide the resources and facilities required to meet the additional need for space and for other necessities of prison existence. Likewise, although state-appointed experts have repeatedly provided numerous methods by which the state could safely reduce its prison population, their recommendations have been ignored, underfunded, or postponed indefinitely. The convergence of tough-on-crime policies and an unwillingness to expend the necessary funds to support the population growth has brought California's prisons to the breaking point. The state of emergency declared by Governor Schwarzenegger almost three years ago continues to this day, California's prisons remain severely overcrowded, and inmates in the California prison system continue to languish without constitutionally adequate medical and mental health care.

Federal courts do not intervene in state affairs lightly. Principles of federalism, comity, and separation of powers require federal courts to refrain from addressing matters of state government in all but the most pressing of circumstances. Even then, federal courts must proceed cautiously, giving the states

every opportunity to meet their federal constitutional and statutory obligations voluntarily. Unfortunately, during the 8 years of the *Plata* litigation and the 19 years of the *Coleman* litigation, the political branches of California government charged with addressing the crisis in the state's prisons have failed to do so. Instead, the rights of California's prisoners have repeatedly been ignored. Where the political process has utterly failed to protect the constitutional rights of a minority, the courts can, and must, vindicate those rights. *See* John Hart Ely, *Democracy and Distrust* 103, 173 (1980). We do so here, recognizing the seriousness of our action and with the hope that California's leadership will act constructively and cooperatively, and follow the mandate of this court and the PLRA, so as to ultimately eliminate the need for further federal intervention.

ORDER

Within 45 days, defendants shall provide the court with a population reduction plan that will in no more than two years reduce the population of the CDCR's adult institutions to 137.5% of their combined design capacity. Should any of defendants' proposed population reduction measures require the waiver of any provisions of state law, the state shall so advise the court, and shall explain why the requested waiver is permissible under 18 U.S.C. § 3626(a)(1)(B). In preparing their plan, defendants shall consult with plaintiffs, intervenors, and other relevant stakeholders, including the *Coleman* Special Master and the *Plata* Receiver. Should such consultation fail to resolve any objections to the proposed population reduction plan, plaintiffs and intervenors shall file their objections no more than 20 days after defendants file their proposed plan, and defendants shall

file responses to such objections no more than 10 days thereafter. Defendants shall set forth in their proposal the effective dates of the various actions they propose to undertake and their estimate of the reduction in population they expect to achieve after six, twelve, eighteen, and twenty-four months. The court will consider all of the written submissions and make any necessary modifications or changes to defendants' proposed plan before issuing a population reduction plan as an order of the court. The court may before doing so request clarification on any matters and conduct any further hearings it deems necessary. However, given that this court issued a preliminary ruling on this matter almost six months ago so as to "give the parties notice of the likely nature of [this] opinion, and [ ] allow them to plan accordingly," Feb. 9, 2009 Tentative Ruling at 1, the court will look with disfavor upon any effort to postpone or delay an expeditious resolution of the terms of the population reduction plan, including the submission of a proposed plan by the state and the issuance of the order adopting the final plan. The court will not grant any stay of the proceedings prior to the issuance of the final population reduction plan, but will entertain motions to stay implementation of that plan pending the resolution of any appeal to the Supreme Court. We will retain jurisdiction over this matter to ensure compliance with the population reduction plan and to consider any subsequent modifications made necessary by changed circumstances.

IT IS SO ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. CALIFORNIA AND N.D. CALIFORNIA.

Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH.

RALPH COLEMAN, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

MARCIANO PLATA, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

Nov. 3, 2008.

STEPHEN REINHARDT, *Circuit Judge*, LAWRENCE K. KARLTON, *Senior District Judge*, THELTON E. HENDERSON, *Senior District Judge*.

ORDER DENYING DEFENDANTS' MOTION FOR DISMISSAL OR, ALTERNATIVELY, SUMMARY JUDGMENT

This three-judge proceeding arises from two cases in their remedial phases, *Plata v. Schwarzenegger*, No. C01-1351 TEH, and *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, in which courts have

found constitutionally inadequate levels of medical and mental health care in California's prisons. In 2007, this court was convened pursuant to the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626(a)(3)(B), to determine whether to issue a "prisoner release order" directed at alleviating those unconstitutional conditions. Before issuing such an order, we must determine that crowding of California prisons is the primary cause of the violation of Plaintiffs' constitutional rights, and that no other relief will remedy the violation. 18 U.S.C. §§ 3626(a)(3)(E)(i), (ii).

Pending before the Court is Defendants' September 15, 2008, motion for dismissal or, alternatively, summary judgment. Defendants seek dismissal for failure to exhaust and lack of jurisdiction. In the alternative, Defendants contend that there is no genuine issue of material fact as to whether overcrowding is the "primary cause" of the violation of Plaintiffs' right to adequate medical and mental health care. We deny the motion.

I. Defendants' Motion for Dismissal for Failure to Exhaust

Defendants first contend that this proceeding must be dismissed because Plaintiffs failed to "exhaust[ ] their current complaints of overcrowding as the primary cause of the alleged unconstitutional medical care or request the remedy of a prisoner release order in an administrative grievance." Defs.' Mot. to Dismiss at 12. Plaintiffs argue that exhaustion is not required, and we agree.

The PLRA provides, in part, that "*[n]o action shall be brought* with respect to prison conditions under section 1983 of this title, or any other Federal law, by

a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). Here, we have two preexisting lawsuits in which the constitutionality of the prison conditions has already been determined adversely to Defendants. Defendants do not contend that those preexisting actions, *Plata* and *Coleman*, should be dismissed for failure to exhaust. Instead, they argue that additional exhaustion is required because Plaintiffs assert before this three-judge court "that overcrowding is the primary reason for the alleged unconstitutional conditions" and because Plaintiffs "request . . . a prisoner release order." In essence, Defendants argue that the three-judge court proceeding is a new "action" for purposes of § 1997e(a), and that the issue as to "primary cause" and the request as to the remedy of a prisoner release order must accordingly be exhausted. However, proceedings before a three-judge court convened to consider a request for a particular form of relief in cases in which prison conditions have already been found to be unconstitutional are not new "action[s]" under § 1997e(a), and accordingly that section is not applicable to such proceedings. Instead, a three-judge court is convened under the PLRA only for the purpose of considering whether overcrowding is the primary cause of the constitutional violation and whether the requested relief is warranted under that act.

In this proceeding, Plaintiffs seek to implement orders obtained in the preexisting actions. The *Coleman* Plaintiffs seek to implement a judgment entered against the state of California in 1995 (before

the enactment of the PLRA). *See Coleman v. Wilson*, 912 F.Supp. 1282 (E.D.Cal.1995). The *Plata* Plaintiffs seek to implement a Stipulation for Injunctive Relief, which provides that, if the state "does not provide a level of medical care sufficient to meet the minimum requirements of the Eighth Amendment of the United States Constitution, the Court may grant relief as authorized under the [PLRA]." Stipulation for Injunctive Relief, *Plata v. Davis*, No. C-01-1351 (TEH) (N.D. Cal. June 13, 2002) at 14.[1] Plaintiffs merely seek to implement these prior orders with additional forms of relief.[2]

The PLRA itself squarely refutes Defendants' argument that this proceeding is a new action. The PLRA provisions governing three-judge court proceedings clearly demonstrate that these proceedings are a part of preexisting civil actions, not a new action. *See* 18 U.S.C. § 3626(a)(3)(B) ("In *any* civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court . . . ." (emphasis added)). Most notably, the PLRA permits "a Federal judge *before whom a civil action with respect to prison conditions is pending*" to "sua sponte request the convening of a three-judge court . . . ." 18 U.S.C. § 3626(a)(3)(D) (emphasis

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[1] The Stipulation also states that the court "shall have the power to enforce the Stipulation through specific performance *and all other remedies permitted by law.*" *Id.* (emphasis added).

[2] In this regard, the present proceeding is functionally identical to *Clarkson v. Coughlin*, No. 91-CIV-1792 (RWS), 2006 WL 587345 (S.D.N.Y. Mar.10, 2006), in which the district court rejected the defendant's argument that exhaustion was required before the plaintiffs could file a motion "that exclusively [sought] the enforcement of the terms of" a consent decree. *Id.* at *3.

added). Furthermore, a plaintiff seeking a prisoner release order need not prepare an amended complaint, but must simply "file . . . a request for such relief" along with "a request for a three-judge court and material sufficient to demonstrate that the requirements of [18 U.S.C. § 3626(a)(3)(A)] have been met." 18 U.S.C. § 3626(a)(3)(C). If three-judge court proceedings involved new "actions," it would be impossible for a federal judge to initiate such proceedings sua sponte or for a plaintiff to initiate such proceedings without amending the complaint. Because the proceeding now before us is not a new action but rather a part of a preexisting civil action, the exhaustion requirement is not applicable. 42 U.S.C. § 1997e(a).

Alternatively, when we examine separately the issues Defendants contend must be exhausted, we conclude that exhaustion would not be required even if a new action were before us rather than the proceeding at issue.

As to Defendants' assertion that Plaintiffs must exhaust their "claim" that overcrowding is the primary cause of the constitutional violations, the PLRA requires exhaustion of claims only "with respect to prison conditions." 42 U.S.C. § 1997e(a). The prison conditions underlying this proceeding are constitutionally inadequate medical and mental health care; those claims have already been adjudicated in the *Plata* and *Coleman* lawsuits. The primary cause of the failure to provide the constitutionally required care is not in itself a "prison condition." It is simply a legal relationship that the courts must determine with respect to the reasons the unconstitutional

condition exists in order to order a particular form of relief.

The PLRA provides that a prisoner release order cannot be issued absent clear and convincing evidence that "crowding is the primary cause of the violation." 18 U.S.C. §§ 3626(a)(3)(E)(i). The text of the PLRA demonstrates that this requirement is not an element of the claim regarding unconstitutional prison conditions but a limitation on the court's remedial authority. Section 3626 as a whole is titled "Appropriate *remedies* with respect to prison conditions," and § 3626(a) enumerates the "[r]equirements for *relief*" in a civil action regarding prison conditions. The PLRA is explicit in limiting *the court's* authority rather than altering the elements of the underlying claim. *See* 18 U.S.C. § 3626(a)(1)(A) ("The court shall not grant or approve any prospective relief unless . . . ."); 18 U.S.C. § 3626(a)(3)(A) ("[N]o court shall enter a prisoner release order unless . . . ."). The specific provision at issue in this proceeding provides that "[t]he three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that (i) crowding is the primary cause of the violation. . . ." 18 U.S.C. § 3626(a)(3)(E). Because the factual findings required by the PLRA are not elements of the claim of unconstitutional prison conditions but are pre-conditions to the exercise of the Court's remedial authority, Plaintiffs' contentions regarding "primary cause" need not be exhausted.

We reach the same conclusion as to Plaintiffs' request for relief in the form of a prisoner release order. First, like the "primary cause" issue, the particular form of relief requested in litigation is not a "prison condition." Second, *Booth v. Churner*, 532

U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001), suggests that the form of relief a prisoner seeks in court is irrelevant to the exhaustion inquiry. *Id.* at 739. Following *Booth*, the Seventh Circuit held that "no administrative system may demand that the prisoner specify each remedy later sought in litigation. . . ." *Strong v. David*, 297 F.3d 646, 649 (7th Cir.2002) (citing *Booth*, 532 U.S. 732). Finally, "[c]ompliance with prison grievance procedures . . . is all that is required by the PLRA to 'properly exhaust.'" *Jones v. Bock*, 549 U.S. 199, 127 S.Ct. 910, 922-23, 166 L.Ed.2d 798 (2007). California's regulations require that prisoner grievances "describe the problem and action requested." Cal.Code Reg., tit. 15, § 3084.2. Here, the "problem" is the denial of constitutionally adequate medical and mental health care, and the "action requested" is the provision of adequate medical and mental health care. The prisoner release order is simply one of numerous *means* to that end, and nothing in the regulations suggests that the prisoner must describe all of the possible means by which a requested action could be accomplished by the state in the exercise of its discretion. What means will best help remedy the constitutional violation—for example, building additional facilities, hiring additional doctors, implementing new quality control mechanisms, or releasing prisoners—is a question the prisoner is in no position to evaluate.[3] Accordingly, under the California regulations that

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[3] We note that our interpretation of the PLRA and the California regulations as not requiring exhaustion of mere means to a requested end accords with and promotes the PLRA's purpose of increasing the state's freedom to manage its prisons by choosing how to address prisoner complaints.

define proper exhaustion in the present proceeding, Plaintiffs are not required to specify a request for a prisoner release order when exhausting the administrative process under 42 U.S.C. § 1997e(a).[4]

Because the present proceeding is not a new action and because neither of the issues before the Court in this proceeding would require exhaustion in any event, Plaintiffs are not required to exhaust their contentions regarding the relationship between overcrowding and inadequate medical and mental health care in California's prisons or their request for a prisoner release order before seeking such an order from this Court.[5]

II. Defendants' Motion for Dismissal for Lack of Jurisdiction

Defendants next raise two jurisdictional arguments. First, they argue that the three-judge court was improperly convened because "no federal judge has ordered less intrusive relief directed at address-

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[4] Because we do not believe exhaustion of either the primary cause issue or the request for relief is required as a general matter, we need not address whether the particular circumstances of *Coleman* and *Plata*—in particular, the fact that *Coleman* proceeded to judgment prior to the passage of the PLRA and that, in *Plata*, the state entered into an agreement that "irrevocably waive[d]" its exhaustion defense in any civil lawsuit brought by Plaintiffs and their lawyers seeking injunctive relief on the basis of inadequate medical care in California's prisons—render exhaustion unnecessary here.

[5] We reject Defendants' argument that we have "indicated [our] view of this proceeding as akin to a new action through [our] handling of the issues." Our reliance on the adjudicatory procedures established by the Federal Rules of Civil Procedure reflects nothing more than our judgment about the best method for determining whether to issue a prisoner release order.

ing prison overcrowding." Defs.' Mot. to Dismiss at 15. Even if the Defendants could properly raise this argument now, over a year after the motion to convene the court was granted, Defendants' argument is contrary to the PLRA's plain language. The PLRA permits a three-judge court to be convened if "a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order," 18 U.S.C. § 3626(a)(3)(A)(i), and if Defendants have had a reasonable amount of time to comply with that order, *id.* § 3626(a)(3)(A)(ii). Here, both parties agree that the federal right sought to be remedied is the Plaintiffs' right to constitutionally adequate medical and mental health care.[6] Defendants do not dispute that the *Plata* and *Coleman* courts have entered orders for less intrusive relief directed at remedying the deprivation of that right. *See* Order Granting Plaintiffs' Motion to Convene Three-Judge Court, *Plata v. Schwarzenegger*, 2007 WL 2122657, *3 (N.D.Cal. July 23, 2007); Order, *Coleman v. Schwarzenegger*, 2007 WL 2122636, *2 (E.D.Cal. July 23, 2007) ("Since February of 1996, this court has issued at least seventy-seven substantive orders to defendants in an effort to bring the CDCR's mental health care delivery system into compliance with the requirements of the Eighth Amendment."). Defendants' first jurisdic-

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[6] *Roberts v. County of Mahoning*, 495 F.Supp.2d 694 (N.D.Ohio 2006), cited by Defendants, is distinguishable because the court in that case found that overcrowding itself was a "component of the unconstitutional conditions in the jail." *Id.* at 696. Here, Plaintiffs do not argue that overcrowding itself is unconstitutional.

tional challenge thus fails.

Second, Defendants cite to *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996), and argue that Plaintiffs lack standing to seek a prisoner release order directed at the general prison population. But *Lewis* held that systemwide relief for prison inmates was inappropriate in that case not because of a lack of standing but because remedies must be "limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Id.* at 357, 360 n. 7. Here, both the *Coleman* and *Plata* courts have found systemic constitutional injury. *See* Findings of Fact and Conclusions of Law re Appointment of Receiver, *Plata v. Schwarzenegger*, 2005 WL 2932253, *34 (N.D.Cal. Oct.3, 2005); Order, *Coleman v. Schwarzenegger*, 912 F.Supp. 1282 (E.D.Cal.1995). Broad relief that affects individuals other than the plaintiffs may be appropriate in cases of systemwide injury. *See Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 463-65 (1979) (holding that the record supported the district court's order requiring defendants to submit a systemwide desegregation plan). In any event, the appropriateness of the prisoner release order and its scope are questions to be addressed by the Court when formulating an order granting relief, and do not affect Plaintiffs' standing. We therefore deny Defendants' motion to dismiss the case for lack of jurisdiction.

III. Defendants' Motion for Summary Judgment

The PLRA requires that before entering a prisoner release order the three-judge court must find by clear and convincing evidence that "crowding is the primary cause of the violation of a Federal right," 18

U.S.C. § 3626(a)(3)(E)(i)—in this instance the right to a constitutionally adequate level of medical and mental health care in California's prisons. Defendants contend that they are entitled to summary judgment as a matter of law because there is no genuine issue of material fact as to whether crowding is the primary cause of the violation of that right. *See* Fed. R. Civ. Pro. 56(c). Defendants, being the moving party, have the initial responsibility of informing this court of the basis for its belief that there is an absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Defendants may meet this burden by "produc[ing] evidence negating an essential element of the nonmoving party's claim," or by "show[ing] that the nonmoving party does not have evidence of an essential element to carry its ultimate burden of persuasion at trial." *See Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102 (9th Cir.2000).

In moving for summary judgment, Defendants misconstrue the "primary cause" standard. They make much of statements by a Plaintiffs' expert, Dr. Ronald Shansky, by the *Coleman* Special Master, and in the Findings of Fact and Conclusions of Law regarding the Appointment of a Receiver in *Plata*, to the effect that the problems underlying the constitutional delivery of medical care are "interrelated" and "polycentric," and that population reduction alone may not bring the level of care to a constitutionally acceptable level. Mello Decl. Ex. A, Shansky Dep. 12:22-13:7, 88:20-24, 132:6-9, 61:14-24, Dec. 10, 2007; Special Master's Response to Court's May 17, 2007 Request for Information at 15, May 31, 2007

(*Coleman* Docket # 2253); Findings of Fact Conclusions of Law re Receiver, *Plata v. Schwarzenegger*, 2005 WL 2932253, *25 (N.D.Cal. Oct.3, 2005). But "[p]robably it cannot be said of any event that it has a single causal antecedent; usually there are many." 4 Harper, James and Gray on Torts § 20.2 (3d ed.2007). The "primary cause" standard does not require that crowding be the exclusive cause of the unconstitutional prison conditions—it requires only that it be the "primary" one. Accepting, *arguendo*, Defendants' definition of "primary" as "first or highest in rank or importance; chief; principal," Defs.' Mot. to Dismiss at 18 (citing *Random House Webster's Unabridged Dictionary* 1537 (2d ed.1998)), that there are multiple, interrelated causes of inadequate care does not mean that one cause cannot be the most important.

Similarly, Defendants misunderstand the inquiry in arguing that crowding is not the "primary cause" because the Receiver's remedial efforts have led to some improvement in the delivery of medical care. *See* Defs.' Mot. to Dismiss at 19; Reply at 12. As the *Plata* and *Coleman* courts found in granting the motion to convene this three-judge court, prior remedial efforts not directed at reducing the prison population level have failed to bring the delivery of medical and mental health care to constitutionally acceptable levels. *See Plata*, 2007 WL 2122657 at *3; *Coleman*, 2007 WL 2122636 at *3. This may be some evidence that overcrowding *is* the primary cause of the violation at issue here. Moreover, "crowding" refers to population density: it does not mean only that the prison population is large, but that it is large in relation to the available resources and facilities. Therefore, evidence that an increase in resources has

improved or will improve conditions could even indicate that crowding *is* the primary cause of the constitutional violation. And Defendants' suggestion that "population-related problems" could be addressed through measures other than a prisoner release order, Defs.' Mot. to Dismiss at 19, confuses the "primary cause" issue with the appropriateness and the proper scope of a prisoner release order.

Defendants also make the peculiar argument that overcrowding is not the primary cause of the constitutional violations because the *Plata* court stated, and Plaintiffs' expert agreed, that "a single root cause of this crisis" is the "historical lack of leadership, planning, and vision by the State's highest officials *during a period of exponential growth of the prison population.*" Findings of Fact and Conclusions of Law re Receiver, *Plata*, 2005 WL 2932253 at *25 (emphasis added); *see* Defs.' Mot. to Dismiss at 18-19. Defendants' inability or unwillingness to tackle the problem of the increasing prison population does not support the contention that overcrowding is not the primary cause of the unconstitutional delivery of of [sic] medical or mental health care. It simply helps explain why overcrowding exists and has now become a problem that may be the primary cause of the constitutional violation.

Finally, Defendants assert that Plaintiffs have no evidence to show that crowding is the primary cause of the constitutional violation. Plaintiffs have, however, presented sufficient evidence to create a genuine issue of material fact as to whether crowding is the primary cause of inadequate care. *See, e.g.*, RJN Ex. A at 1, Letter from the Receiver, July 24, 2006 ("[T]he overcrowding and medical crises are

integrally related . . . [and][i]t will not be possible to raise access to, and quality of, medical care to constitutional levels with overpopulation at its current levels."); RJN Ex. B at 1, Letter from the Receiver, Vol. 1, Number 4, Oct. 27, 2006 ("[I]t is clear that overcrowding is at the root of many of the difficulties that afflict medical care."); Special Master's Response to Court's May 17, 2007 Request for Information, *supra*, at 7 ("The struggle for acquisition of a meaningful portion of healthcare clinical space, already able to meet just half the medical demand, escalates relentlessly. . . . Excessive population, thus, results in a reduction of programming space now occupied by inmate bunks, greater competition for use of the diminishing available space; fewer escorting correctional officers to permit access to the diminishing space; and, ultimately, the increasing frustration and demoralization of clinicians trying to provide the treatment."); *id.* at 14 ("It is easy to conclude that defendants' ability to provide required mental health services would be enhanced considerably by a reduction in the overall census of CDCR."). From this evidence alone, inferences can be drawn that create a genuine issue of fact as to whether overcrowding is the primary cause of the constitutional violation.

In addition, Dr. Shansky's reports set forth specific facts that lead him to conclude that, factually, "overcrowding is the primary cause of the current status of medical crisis in the CDCR." Shansky Decl., Ex. A at 50 (Nov. 9, 2007); *see also id.*, Ex. C at 36 (Sept. 9, 2008). Although the primary cause issue is ultimately a question of law for the three-judge court to decide, the Federal Rules of Evidence allow experts to express opinions that embrace the ultimate issue in a

case. Fed.R.Evid. 704(a). Dr. Shanksy's statement is thus admissible to the extent that it is his opinion on the factual cause of the constitutional violation. *See* 3 Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence § 7:20 (3d ed. 2007) ("Fed.R.Evid. 704 removes an obstacle that might otherwise block expert testimony on issues of cause . . . ."); *Miksis v. Howard*, 106 F.3d 754, 762 (7th Cir.1997) (holding that expert testimony on whether the driver's sleep deprivation was the primary cause of the accident was properly admitted because "there was a factual dispute as to whether the driver was fatigued, and whether that fatigue could have caused the driver to hit [the] construction bucket"); *Davis v. Mason County*, 927 F.2d 1473, 1484-1486 (9th Cir.1991) (holding that the district court properly allowed expert testimony that there was a causal link between the reckless failure to adequately train police officers and plaintiffs' injuries), *overruled on other grounds by Davis v. City and County of San Francisco*, 976 F.2d 1536, 1556 (9th Cir.1992). Defendants also raise a hearsay objection to Dr. Shansky's reports, but "experts are entitled to rely on hearsay in forming their opinions." *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 873 (9th Cir.2001); Fed.R.Evid. 703 ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data [on which the expert relies for his opinion] need not be admissible in evidence in order for the opinion to be admitted."). Defendants' objections based on relevance and lack of foundation also fail: Dr. Shansky's opinion regarding the cause of the inadequate medical care in California prisons is clearly relevant and has an adequate foundation—

the factual bases disclosed in the reports. In sum, whether we consider only the facts upon which Dr. Shansky based his expert opinion as to the primary cause of the constitutional violation and draw from them the inferences most favorable to Plaintiffs, or we consider the conclusion that he himself drew, as an expert, Dr. Shansky's reports provide sufficient admissible evidence to create a genuine issue of material fact.

Viewing the evidence in the light most favorable to Plaintiffs and drawing all justifiable inferences in their favor, as we are required to do for the non-moving party on summary judgment, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), we conclude that there is sufficient evidence to raise a genuine issue of fact as to whether Plaintiffs can prove by clear and convincing evidence that crowding is the primary cause of of [sic] the constitutional violations found in *Coleman* and *Plata*. For the foregoing reasons, we deny Defendants' motion for summary judgment.

IV. Conclusion

The motion for dismissal or for summary judgment is DENIED. Plaintiffs' and Defendants' Requests for Judicial Notice are GRANTED. To the extent that we rely in the above order on Dr. Shansky's reports, Defendants' objections to those reports are OVERRULED. We find no need to reach the balance of Defendants' evidentiary objections at this time and will not resolve them for the purposes of this summary judgment motion.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT,
N.D. CALIFORNIA.

No. C01-1351 TEH

MARCIANO PLATA, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

July 23, 2007

ORDER GRANTING PLAINTIFFS' MOTION TO CONVENE THREE-JUDGE COURT

THELTON E. HENDERSON, *United States District Court Judge.*

This matter came before the Court on Wednesday, June 27, 2007, on Plaintiffs' motion to convene a three-judge court to consider issuing a prisoner release order pursuant to 18 U.S.C. § 3626(a)(3). The motion was heard jointly with a similar motion in *Coleman v. Schwarzenegger*, Case No. Civ. S-90-0520 LKK JFM, a case presided over by the Honorable Lawrence K. Karlton in the United States District Court for the Eastern District of California. After carefully considering all of the written and oral arguments presented to the Court in this case,

including those contained in the parties' initial briefs filed in November and December 2006 and presented at the January 8, 2007 hearing, the Court now GRANTS Plaintiffs' motion for the reasons discussed below.

LEGAL STANDARD

The Prison Litigation Reform Act ("PLRA") provides that:

> no court shall enter a prisoner release order unless—
>
> > (i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and
> >
> > (ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

18 U.S.C. § 3626(a)(3)(A). The term "prisoner release order" does not necessarily mean an order requiring the release of inmates; instead, the PLRA broadly defines the term as including "any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C. § 3626(g)(4).

"A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met." 18 U.S.C. § 3626(a)(3)(C). A judge may also sua sponte request that a three-judge court be convened, provided that

the requirements of subparagraph (A) have been met and the court "believes that a prison release order should be considered." 18 U.S.C. § 3626(a)(3)(D).

The PLRA provides that a three-judge court may only enter a prisoner release order "if the court finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E). However, the statute does not require a district court deciding whether to convene a three-judge court to consider the likelihood that these criteria for entering a prisoner release order will ultimately be satisfied, and neither the parties' papers nor this Court's independent research revealed any authority for the proposition that such criteria must be considered at this stage of the proceedings. Thus, the Court's analysis in deciding Plaintiffs' motion necessarily focuses on the requirements of 18 U.S.C. § 3626(a)(3)(A). For purposes of deciding this motion, the Court therefore does not consider, for example, whether overcrowding is the primary cause of the unconstitutional nature of the delivery of medical health care in prisons, nor does the Court consider at this time the type of relief that a three-judge court might impose if it finds that a prisoner release order is warranted.

PROCEDURAL HISTORY[1]

Plaintiffs filed their motion on November 13, 2006, and the Court heard argument on January 8, 2007.

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[1] The factual background and procedural history of this case have been well-documented elsewhere. *See, e.g.*, Oct. 3, 2005 Findings of Fact & Conclusions of Law Re: Appointment of Receiver. The Court focuses its attention in this order on the procedural history of Plaintiffs' motion to convene a three-judge court.

Following the hearing, the parties submitted supplemental briefs at the Court's request, and the Court issued an order on Plaintiffs' motion on February 15, 2007. In that order, the Court set Plaintiffs' motion for a further hearing on June 11, 2007, and also directed the Receiver to report to the Court his assessment of how "overcrowding is interfering with his ability to successfully remedy the constitutional violations at issue." Feb. 15, 2007 Order at 4-5. The Court also directed the State to file a report with the Court discussing: (1) specific, concrete measures the State "has taken, is taking, or is planning to take" to reduce the number of inmates confined in state prisons over the next two years; (2) an estimate of when the Governor anticipated rescinding his October 2006 emergency proclamation regarding prison overcrowding; and (3) the current total population of inmates confined by the California Department of Corrections and Rehabilitation ("CDCR"). *Id.* The Receiver and the State timely filed their reports on May 15 and 16, 2007, respectively, and the parties submitted timely responses to those reports on May 29, 2007.[2]

On June 6, 2007, this Court vacated the June 11 hearing and scheduled Plaintiffs' motion for a joint hearing with a similar motion in *Coleman* on June

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[2] In his May 15 report, the Receiver also recommended three remedial courses of action. Those recommendations are not discussed in this order because the Court agrees with the Receiver that the "recommendations . . . should be addressed independently of plaintiff's [sic] request for a population cap." Receiver's Request for Permission to File Mot. to Implement Recommendations in Overcrowding Report at 3. The Receiver's request to file a motion to implement his three recommendations remains pending, and the Court will issue a separate order addressing that request at a later time.

27, 2007, to be held at the United States District Court in Sacramento. The Court also granted the Receiver's June 4 request to file a supplemental report on overcrowding, which the Receiver filed on June 11, 2007. The parties were given leave to respond to the Receiver's supplemental report by June 18, 2007. Defendants filed a timely response, but Plaintiffs chose not to file a response.

Subsequent to the motion hearing, the CDCR Expert Panel on Adult Offender Reentry and Recidivism Reduction Programs published their "Report to the California State Legislature: A Roadmap for Effective Offender Programming in California," which Defendants submitted via a request for judicial notice on July 2, 2007. The following day, this Court ordered the parties to file supplemental briefs explaining "how, if at all, the courts should consider the expert panel's report in resolving the pending motions to convene a three-judge court." July 3, 2007 Order Requesting Add'l Briefing on Pls.' Mot. to Convene Three-Judge Court at 2. Defendants and Plaintiffs filed timely supplemental briefs on July 11 and 17, 2007, respectively.

The Court also received an amicus brief from Californians United for a Responsible Budget ("CURB") on June 13, 2007, and a supplemental amicus brief from the California Correctional Peace Officers Association ("CCPOA") on June 18, 2007. Although neither of these organizations sought leave to file amicus briefs, the Court nonetheless reviewed their arguments, including the oral arguments presented by the CCPOA, in considering Plaintiffs' motion.[3] The Court finds, however, that both amici

[3] The Court granted CCPOA leave to file an amicus brief on Plaintiffs' motion on December 5, 2006, and CCPOA filed an

raise arguments that concern whether a three-judge court should ultimately enter a prisoner release order and not whether this Court should request that a three-judge court be convened. Consequently, the amici's arguments are more appropriately addressed to any three-judge court that is convened, rather than to this Court at this time. CCPOA, in fact, candidly states in its supplemental amicus brief that it "does not purport to speak to constitutional violations or the question of whether a prisoner release order would remedy constitutional violations or even what such an order would look like," CCPOA Suppl. Amicus Br. at 5, and its arguments thus may not even be relevant to a three-judge court considering whether a prisoner release order should be entered.

DISCUSSION

In its February 15, 2007 order, this Court found that the remedial orders stipulated to by the parties and issued by the Court in June 2002 and September 2004 constituted "order[s] for less intrusive relief that [have] failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order." 18 U.S.C. § 3626(a)(3)(A)(i). At the June 27, 2007 hearing, Defendants urged this Court to reconsider this finding, arguing that the order appointing the Receiver was a "culminating order" in this case and must be considered in determining whether to convene a three-judge court. The Court agrees with Defendants that the presence of the

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amicus brief on December 11, 2006. CCPOA failed to seek leave from the Court to file a supplemental amicus brief and instead simply filed its supplemental brief with the Court. Similarly, although CURB included a request for leave in its amicus brief, it filed its brief without waiting for the Court to grant that request for leave.

Receiver makes this case unique and, in fact, previously explained that Plaintiffs' motion "must be considered in the unique context of the recently initiated Receivership." Feb. 15, 2007 Order at 3. However, as Defendants acknowledged at the hearing, the stipulated orders from June 2002 and September 2004 are not irrelevant, and the Court continues to find them to be sufficient to satisfy the first requirement for convening a three-judge court. There can be no question that these orders were previously entered by the Court and constituted considerably less intrusive relief than a prisoner release order.

Moreover, as the Court noted in its order finding the appointment of a receiver to be appropriate, "[t]he Court has given defendants every reasonable opportunity to bring its prison medical system up to constitutional standards, and it is beyond reasonable dispute that the State has failed." Oct. 3, 2005 Findings of Fact & Conclusions of Law Re: Appointment of Receiver at 1. Similarly, the Court explained that it "has attempted to move defendants toward meeting constitutional standards by issuing a series of court orders with detailed objectives and measures. Unfortunately, defendants have repeatedly delayed their progress and ultimately failed to achieve even a semblance of compliance" with the June 13, 2002 stipulated order for injunctive relief or the September 17, 2004 stipulated order regarding the quality of patient care. *Id.* at 27. Thus, not only is it clear that the Court has previously entered orders for less intrusive relief; it is equally clear that Defendants have had a "reasonable amount of time" to comply with the June 2002 and September 2004 orders. 18 U.S.C. § 3626(a)(3)(A)(ii).

The only remaining question is how to interpret the "reasonable amount of time" requirement in the context of this case, where the Court appointed the Receiver to take control from Defendants over the medical health care system in California's prisons. It is true that the Receiver did not commence his duties until April 2006, and it is also true that the Receiver has only recently filed his proposed Plan of Action and is not due to file his final Plan of Action until November 2007. However, Defendants' position would essentially have this Court wait years to see if the Receiver's Plan of Action is able to remedy the constitutional deficiencies in this case, and the Court has already determined that such delay is neither necessary nor appropriate. Feb. 15, 2007 Order at 4. While the Court agrees that the Receiver has made much progress since his appointment, that fact does not render irrelevant the previous five years of complete and utter failure by Defendants to cure the constitutional deficiencies in their delivery of medical health care to prisoners. "Where life and death hang[ ] in the balance, courts must act to ensure that constitutional violations are cured sooner rather than later," *id.* at 3, and Defendants have already been given ample opportunity to attempt to bring the delivery of medical care to prisoners up to constitutional standards. It is beyond reason that a willing and competent institution would not be able to show—over a period of several years and with this Court virtually screaming at every step of the way—significant improvements in the hiring of medical personnel, the furnishing of adequate medical facilities, and the development of thoughtful and comprehensive plans for managing the delivery of medical health care. Yet that is precisely what has happened in this case, and it is why the appointment

of the Receiver ultimately became necessary. To use the words of Defendants' counsel at the June 27, 2007 hearing, the appointment order was a "culminating order," and this Court finds it more reasonable to view such an order as the end of a series of less intrusive orders that failed to bring about any meaningful reform, rather than as a new beginning that requires this Court to wait more time, potentially years, to see whether the Receiver's plans will succeed or fail.

Had the Receiver reported to the Court that he did not view overcrowding to be a substantial impediment to implementing the reforms required in this case, the Court may well have reached a different conclusion regarding the appropriateness of convening a three-judge court to consider a prisoner release order. However, quite to the contrary, the Receiver's reports indicate that overcrowding is a serious problem that impacts, for example, his ability to develop adequate reception centers and health facilities because of the high numbers of inmate transfers and the inadequate amount of available health care beds and other physical space. Receiver's Report Re: Overcrowding at 26-28. Overcrowding also negatively impacts the Receiver's ability to hire and retain competent medical and managerial staff. *Id.* at 24-26. Beyond that, the Receiver reports that:

> Every element of the Plan of Action faces crowding related obstacles. Furthermore, overcrowding does not only adversely impact the Receiver's substantive plans, it also adversely impacts on the very process of implementing remedies because overcrowding, and the resulting day to day operational chaos of the CDCR, creates regular "crisis" situations which call for action on the

> part of the Receivership and take time, energy, and person power away from important remedial programs.

Id. at 28-29. Although the Receiver asserts that his "Plan of Action will work" because "[f]ailure is not an option," and that "those . . . who think that population controls will solve California's prison health care problems . . . are simply wrong," he also explains that "[p]opulation limits may help effectuate a more timely and cost effective remedial process." *Id.* at 41, 42.

Tellingly, the Receiver's concerns about the impacts of overcrowding on his ability to reform the medical health care delivery system became even stronger in the weeks following his initial report. In his supplemental report, filed just four weeks after his initial report, the Receiver concluded that: "Mission changes, yard flips, and prison-to-prison transfers, aggravated by the limited alternatives imposed by overcrowding, are now assuming a size, scope and frequency that will *clearly* extend the timeframes and costs of the receivership and *may render adequate medical care impossible,* especially for patients who require longer term chronic care." Receiver's Suppl. Report Re: Overcrowding at 10 (emphases added). While the Court appreciates Defendants' statements that greater coordination between the State and the Receiver will alleviate some of the Receiver's concerns, such sentiments only underscore the Receiver's expressed concerns that overcrowding presents serious problems not only because of the substantive ways in which it interferes with delivery of medical care, but also because of the amount of time and attention the Receiver must devote to dealing with crowding-related issues. It is clear to the

Court that the crowded conditions of California's prisons, which are now packed well beyond their intended capacity, are having—and in the absence of any intervening remedial action, will continue to have—a serious impact on the Receiver's ability to complete the job for which he was appointed: namely, to eliminate the unconstitutional conditions surrounding delivery of inmate medical health care.

The Court acknowledges that the State has recently attempted to take action to reduce prison crowding through Assembly Bill 900 ("AB 900"), which Governor Schwarzenegger signed into law on May 3, 2007. Even assuming that the provisions of this legislation were to be timely implemented, however—which the Court has doubts about given the history of delays in this case, the highly controversial and political nature of the subject matter, and the conflicts that may sometimes arise between meeting constitutional standards and the tough-on-crime approach to law enforcement espoused by some members of the California Legislature—it is unclear whether the legislation would reduce the impacts of overcrowding in any meaningful way. For instance, Defendants' own estimates show only a slight projected reduction in the male inmate population: from approximately 162,848 male inmates in May 2007 to 159,939 male inmates in March 2008, and back up to 162,674 male inmates in March 2009—a net projected decrease of less than 200 inmates over two years. May 16, 2007 Kernan Decl. ¶¶ 5, 12. Defendants do not discuss any projected reduction to the current (as of May 2007) female inmate population of 12,141, which leads this Court to believe that there will be no significant reduction in the female inmate population either. *See id.* ¶ 5 (projecting female inmate population of 12,200 in March 2008 and 12,562

in March 2009, without taking into account "the impact [of] AB 900 and other population reduction strategies" planned by the State). In addition, Defendants failed to respond to the Receiver's analysis that the State's plans to create more in-fill beds under AB 900 "does nothing to address the serious levels of crowding within the CDCR's most dangerous high security prisons" because only 190 in-fill beds are proposed for Level III, Level IV, and Security Housing Unit ("SHU") inmates, whereas the State itself projects an increase of 7710 inmates at these security levels between the 2007-08 and 2011-12 fiscal years. Receiver's Report Re: Overcrowding at 39; *id.* at Ex. 26. Beyond that, AB 900 fails to address the critical component of staffing—made even more critical by the undisputed fact that California's prison system is currently severely understaffed in terms of both medical and correctional officers—and fails to allocate adequate space for delivering health care, *id.* at 36-38.

In any event, the Court need not determine at this stage of the proceedings whether AB 900 will prove to be effective at reducing crowding sufficiently so that it no longer has a deleterious impact on the Receiver's ability to develop a constitutionally adequate medical health care system in California's prisons. As Plaintiffs correctly argue, AB 900 and the Receiver's Plan of Action may proceed simultaneously with a three-judge court's consideration of the necessity for a prisoner release order. The same is true for any other reforms being considered by the State, including those raised by the CDCR's expert panel report. If, for example, the reforms in the expert panel report were actually implemented and reduced levels of prison crowding as estimated, then a three-judge court may find that a prisoner release order is not

warranted. However, it would be premature for this Court to make any determination at this time as to whether Plaintiffs will ultimately be able to bear their burden of convincing a three-judge court "by clear and convincing evidence" that "crowding is the primary cause" of the deprivation of constitutionally adequate medical health care and that "no other relief will remedy" that deprivation. 18 U.S.C. § 3626(a)(3)(E). To grant Plaintiffs' motion to convene a three-judge court, this Court need only find that the two components of 18 U.S.C. § 3626(a)(3)(A) are satisfied—a finding the Court reaches for all of the reasons discussed above and in its February 15, 2007 order.[4]

CONCLUSION

As this Court has repeatedly stated, this case is unique because of the unprecedented size and scope of the Receivership, the appointment of which Defendants acknowledged was necessary given their own repeated failed attempts at meaningful reform. Of relevance to the pending motion, this case is also somewhat unique in that even Defendants acknowledge the seriousness of the overcrowding problem, which led the Governor to declare a state of emergency in California's prisons in October 2006. While

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[4] Although no party raised this issue, it is unclear whether the requirement that the court "believe[ ] that a prison release order should be considered" applies to courts ruling on motions to convene a three-judge court brought by a party or only to courts considering a request to convene a three-judge court sua sponte. 18 U.S.C. § 3626(a)(3)(D). However, the Court need not decide that legal question because it concludes for all of the reasons discussed in this order that a prisoner release order should be considered, and the requirement, if it applies, is therefore satisfied.

there remains dispute over whether crowded conditions are the primary cause of the constitutional problems with the medical health care system in California prisons, or whether any relief other than a prisoner release order will remedy the constitutional deprivations in this case, there can be no dispute that overcrowding is at least part of the problem. The record is equally clear that the Receiver will be unable to eliminate the constitutional deficiencies at issue in this case in a reasonable amount of time unless something is done to address the crowded conditions in California's prisons. This Court therefore believes that a three-judge court should consider whether a prisoner release order is warranted under 18 U.S.C. § 3626(a)(3)(E).

Accordingly, and because this Court finds that the conditions specified in 18 U.S.C. § 3626(a)(3)(A) have been satisfied, IT IS HEREBY ORDERED that Plaintiffs' motion to convene a three-judge court to consider a prisoner release order is GRANTED. The Clerk shall serve a copy of this order on the Chief Judge of the United States Court of Appeals for the Ninth Circuit to satisfy the notification requirement of 28 U.S.C. § 2284(b)(1). For purposes of judicial economy and avoiding the risk of inconsistent judgments, the Court recommends that this case be assigned to the same three-judge court convened to consider the issuance of a prisoner release order in *Coleman v. Schwarzenegger,* Case No. CIV S-90-0520 LKK JFM (E.D.Cal.).

Although the Court has ordered that a three-judge court be convened, it also continues to encourage the parties to attempt an informal resolution of the issues raised by Plaintiffs' motion. Contrary to the views expressed by the *Coleman* plaintiffs' counsel at

the June 27, 2007 hearing, a prisoner release order would, indeed, be a radical step, particularly given the size of California's prison system. Such a step may not be necessary if, for example, the parties, in conjunction with the Receiver, were able to reach agreement that Plaintiffs' motion has become moot because AB 900 or any other subsequent action by the State removed overcrowding as a major impediment to bringing the delivery of inmate medical health care up to constitutional standards. This Court would like nothing more than to have the three-judge court be able to enter a consent judgment without the need for a prisoner release order. *See Roberts v. County of Mahoning*, Case No. 4:03 CV 2329, 2007 WL 1655505 (N.D.Ohio June 4, 2007) (case where three-judge court was convened but in which the parties reached agreement prior to the scheduled hearing on whether to issue a prisoner release order). However, unless and until such agreement is reached, the Court is convinced that a three-judge court's consideration of a prisoner release order remains warranted, and that it presents the most appropriate forum under the PLRA in which to weigh the impact of crowded conditions on the ability of the Receiver and Defendants to develop a constitutionally adequate inmate medical health care system.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT,
E.D. CALIFORNIA.

No. CIV S-90-0520 LKK JFM P.

RALPH COLEMAN, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

July 23, 2007.

ORDER

LAWRENCE K. KARLTON, *United States District Court Senior Judge*.

Plaintiffs are a class of state prisoners with serious mental disorders proceeding through counsel in the remedial phase of this class action lawsuit. By order filed September 13, 1995, this court found defendants in violation of the Eighth Amendment with respect to the provision of constitutionally adequate mental health care to inmates incarcerated in the California Department of Corrections, now known as the California Department of Corrections and Rehabilitation ("CDCR"). On December 11, 1995, this court appointed J. Michael Keating, Jr. as the Special Master to oversee the development of remedies for the systemic constitutional violation and to monitor implementation of court-approved remedies. This

action has been in the remedial phase for almost twelve years.

This matter is before the court on plaintiffs' motion to convene a three-judge panel to limit the prison population in the CDCR, pursuant to 28 U.S.C. § 2284 and 18 U.S.C. § 3626(a)(3). The court initially heard argument on plaintiffs' motion on December 11, 2006, after which it continued the hearing to June 4, 2007. The matter was subsequently continued to June 27, 2007, and the court heard oral argument on that day.[1]

On July 2, 2007, defendants filed a document entitled, "Defendants' Further Statement Addressing Plaintiffs' Motion to Convene a Three-Judge Panel to Address Population Issues." Therein, defendants requested that the court take judicial notice of a report to the California Legislature from the CDCR's expert panel on Adult Offender Reentry and Recidivism Reduction Programs entitled, "A Roadmap for Effective Offender Programming in California" (hereafter "Roadmap"). By order filed July 3, 2007, the parties were directed to file additional briefing addressing how, if at all, the court should consider this report in resolving plaintiffs' motion. That briefing was completed on July 18, 2007.

ANALYSIS

I. *Standards*

Section 3626(a)(3)(C) of Title 18 of the United States Code authorizes a party to a civil action concerning prison conditions to file a request for a

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[1] The June 27, 2007 hearing was a joint hearing with the court in *Plata v. Schwarzenegger*, Case No. Civ. 01-1351 TEH (N.D.Cal.). *See* Order filed June 7, 2007.

prisoner release order. As defined by the statute, a prisoner release order "includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C. § 3626(g)(4). A prisoner release order may "be entered only by a three-judge court in accordance with section 2284 of title 28," if other statutory requirements have been met. 18 U.S.C. § 3626(a)(3)(B). A request for a prisoner release order must be accompanied by a request for a three-judge court and "materials sufficient to demonstrate that" the statutory requirements for issuance of such an order have been met. 18 U.S.C. § 3626(a)(3)(C).

A prisoner release order may not be issued unless—

> (i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and
>
> (ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

18 U.S.C. § 3626(a)(3)(A)(i)-(ii). If these requirements are met, "a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered." 18 U.S.C. § 3626(a)(3)(D). The three-judge court "shall enter a prisoner release order only if the court finds by clear and convincing evidence that—

(i) crowding is the primary cause of the violation of the Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

18 U.S.C. § 3626(a)(3)(E).

II. *Analysis*

A. *The Federal Right Sought to Be Remedied*

The federal right at issue in this action is the Eighth Amendment guarantee of constitutionally adequate mental health care for individuals with serious mental disorders who are incarcerated in the California Department of Corrections and Rehabilitation. *See Coleman v. Wilson*, 912 F.Supp. 1282, 1297-98 (E.D.Cal.1995) (citing, *inter alia*, *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) and *Helling v. McKinney*, 509 U.S. 25, 31-32, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993)).

B. *Orders for Less Intrusive Relief*

This court's September 13, 1995 order identified four broad elements required for a constitutionally adequate prison mental health care system:[2] (1) proper screening to identify individuals with serious mental disorders both at the time of their admission to CDCR and over the course of their incarceration, *Coleman*, 912 F.Supp. at 1305; (2) competent staff in sufficient numbers "'to identify and treat in an individualized manner those treatable inmates suffering

[2] As the court noted in that order, in a class action of this magnitude "[f]ocusing on the trees presents the danger of forgetting that what is being examined is the condition of the forest." *Coleman*, 912 F.Supp. at 1305 n. 28. Sadly, that cautionary note remains as applicable to the issues at bar as it was twelve years ago.

from serious mental disorders,'" *id.* at 1306-8 (quoting *Balla v. Idaho State Bd. of Corr.*, 595 F.Supp. 1558, 1577 (D.Idaho 1984)); (3) timely access to appropriate levels of care, including both beds and programs, and appropriate medication, *id.* at 1309-13; and (4) an adequate medical record system, *id.* at 1314-15. A fifth component of an adequate mental health care system, suicide prevention, was found adequate in design but deficient in implementation due to chronic understaffing, *id.* at 1315.

Since February of 1996, this court has issued at least seventy-seven substantive orders to defendants in an effort to bring the CDCR's mental health care delivery system into compliance with the requirements of the Eighth Amendment.[3] Taken together, these orders have contained directives aimed at all of the aforementioned requirements for a constitutionally adequate mental health care delivery system. In addition, the Special Master and his staff have spent hundreds of thousands of hours working with the parties to develop program guidelines for a constitutionally adequate system and monitoring defendants' implementation of those guidelines. During the same period of time, the Special Master has filed seventeen semi-annual monitoring reports and fifty-five other reports reflecting the results of these efforts.

C. *Failure to Remedy Violation of the Constitutional Right At Issue*

As noted above in section II(B), for more than eleven years this court has issued numerous orders in an effort to bring California's prison mental health care system into compliance with the Eighth

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[3] *See* Orders filed February 7, 1996 and onward. There are simply too many orders to list.

Amendment. Among the most significant of those orders has been the directive to defendants to work with the Special Master and his staff to develop and implement remedial plans for the delivery of constitutionally adequate mental health care to class members.

At the time the remedial phase of this action began, the timelines established for development of plans and protocols were relatively short and the parties met those timelines with little need for adjustment. The remedial plans and protocols were provisionally approved by this court on June 27, 1997. Thereafter, the Special Master, his staff, and the parties turned their attention to implementing the system contained in the plans.

Through 2005, the record in this action reflected slow but evident progress toward constitutional compliance. Between 1997, when the court gave provisional approval to the plans and protocols for delivery of mental health care, and 2005, some prisons in California came into sufficient compliance with the provisionally approved remedial plans and protocols that the Special Master and his staff were able to reduce the number of monitoring visits to those prisons. Defendants also developed a screening system that provided adequate identification of mentally ill inmates both on admission to, and during incarceration in, the State prison system. Moreover, while staffing shortages were never completely alleviated, defendants managed, through the use of aggressive recruitment and retention strategies, salary increases, and use of contract staff, to keep the vacancy rate among mental health staff at a nearly acceptable level.

On February 3, 2006, defendants filed a Revised Program Guide for the delivery of mental health care to inmates in the CDCR. On the same day, the Special Master filed a report and recommendation in which he recommended that the court give final approval to "95 percent of the revised Program Guide that the parties and the Special Master agree to and initiate a process for resolving the five percent of the remaining issues that continue to elude resolution." Special Master's Report and Recommendations on Defendants' Revised Program Guide, filed February 3, 2006, at 4. By order filed March 3, 2006, the court gave final approval to the undisputed provisions of the Revised Program Guide and ordered their immediate implementation. *See* Order filed March 3, 2006, at 1.

In spite of the commendable progress described above, defendants' mental health care delivery system has not come into compliance with the Eighth Amendment at any point since this action began. Several prisons remain notable exceptions to the progress made at others, and delays in access to care at the highest level of need—mental health crisis beds, acute inpatient care, and intermediate inpatient care—have plagued the CDCR throughout the course of this litigation. Moreover, defendants' efforts at long-range planning for the delivery of mental health care continues to be hampered by inadequacies in the capture and collection of data and the use of outdated methodologies to interpret that data.[4]

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[4] The inability to engage in adequate long-range planning for the delivery of mental health care has plagued the CDCR throughout the course of this litigation.

The semi-annual reports of the Special Master filed since March 2006 show a significant and thus very troubling reversal of the progress made by defendants in maintaining adequate staffing and access to necessary levels of care. In the Sixteenth Round Monitoring Report, filed December 15, 2006, the Special Master reported that "vacancies among clinicians continued to climb during the monitoring period." *See* Sixteenth Monitoring Report of the Special Master on the Defendants' Compliance with Provisionally Approved Plans, Policies and Protocols, filed December 14 and 15, 2006, at 390-96. The Special Master also reported that "[t]ransfers of inmates to more intensive levels of mental health programming and treatment became increasingly erratic during the monitoring period. Delays in transfers, especially to the most intensive treatment programs for inmates at the highest custody levels, became endemic . . ." *Id.* at 413.

The report on staffing vacancies in the most recent monitoring report is even more grim than the one that preceded it. *See* Seventeenth Monitoring Report of the Special Master on the Defendants' Compliance with Provisionally Approved Plans, Policies and Protocols, Part C, filed June 13, 2007, at 161-64. The Special Master also now reports that "access to higher levels of care was generally inadequate" during this monitoring period. *Id.* at 174-78.

Similarly, on May 31, 2007, the Special Master reported that programming space, beds for mentally ill inmates, and staffing levels have all been "impacted seriously by overcrowding." Special Master's Response to Court's May 17, 2007 Request for Information, filed May 31, 2007, at 4-14 ("Special Master's May 31, 2007 Response"). The staffing

shortages alone mean that the CDCR only has enough staff "to provide full mental health services to roughly two-thirds of its mental health caseload, or two-thirds of required services to its full caseload, or, probably more realistically, some combination of reduced services to some segments of the caseload that can be covered with a third less clinicians than required." *Id.* at 11-12. While acknowledging the difficulties in quantifying precisely the scope of the unmet mental health needs, the Special Master reports that,

> defendants cannot meet at least a substantial portion, amounting in some loose amalgam to about 33 percent, of acknowledged mental health needs with current staffing resources. Insufficient intensive mental health treatment beds and a chronic lack of programming space for mental health treatment contribute further to defendants' inability to meet required mental health services. All three deficiencies are unquestionably exacerbated by overcrowding.

Id. at 14. With a mental health caseload of almost 33,000 inmates, *id.* at 2, this level of unmet needs is unconscionable.[5]

The orders of this court issued from 1995 through the present have failed to remedy the constitutionally inadequate delivery of mental health care to CDCR inmates. That failure appears to be directly attributable to overcrowding and the consequent inability to staff the caseload.

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[5] These recent reports are enough to answer the defendants' contention that the court's recent orders will rectify the slide backward.

D. *Time for Compliance*

It has been almost twelve years since this court found widespread violations of the Eighth Amendment in the delivery of mental health care to the members of the plaintiff class. As discussed in sections II(B) and II(C) of this order, for more than eleven years this court has issued numerous orders directed at bringing California's prison mental health care system into constitutional compliance, and the system still falls woefully short of meeting the requirements of the Eighth Amendment. Defendants have had more than sufficient time to comply with the mandate required by the court's 1995 order and the numerous orders issued since then.

E. *Whether A Prisoner Release Order Should Be Considered*

For the reasons set forth in sections II(A), (B), and (C), this record amply reflects the showing required by 18 U.S.C. § 3626(a)(3)(A)(i)-(ii). This court therefore turns to consideration of whether a prisoner release order should be considered. *See* 18 U.S.C. § 3626(a)(3)(D). In this regard, assuming any showing is required at this stage, the standard is whether a release order may be appropriate. The final decision will rest with the three-judge panel.

There is no dispute that prisons in California are seriously and dangerously overcrowded. The Governor of California has repeatedly and eloquently noted the public emergency caused by overcrowded prison conditions, and the CDCR's website contains several photographs of overcrowding at five of the State's prisons taken in August 2006.[6]

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[6] *See* http://www.cdcr.ca.gov/communications/prisonovercrowding.html

In June 2004, an independent panel appointed by Governor Schwarzenegger found significant overcrowding in the CDCR. *See* June 2004 Report of the Corrections Independent Review Panel at 123-25, Ex. D to Declaration of Michael W. Bien in Support of Plaintiffs' Motion to Convene a Three Judge Panel to Limit the Prison Population. The panel discussed three different levels of population capacity: design capacity, operable capacity, and "maximum 'safe and reasonable' capacity." *Id.* at 123-24. It observed that "operable capacity, which takes into account space needed for effective programming in addition to safety and security, is greater than design capacity, but far less than maximum safe and reasonable capacity." *Id.* at 124. "Maximum 'safe and reasonable' capacity" is defined as "the maximum number of inmates who can safely and reasonably be housed in the prison system." *Id.*[7] The panel reported that the CDCR had determined that the "maximum safe and reasonable capacity of the State's male prisons is 137,764 male inmates." *Id.* at 124. Based on the April 2004 population figures available to the panel, it found that the prison system then exceeded the maximum "safe and reasonable" capacity of the system for male inmates by 4,000 inmates and exceeded the "operable capacity" of the prison system by 30,000 inmates. *Id.*[8]

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[7] The plaintiffs' contention that defendants have attempted to meet the overcrowding issue by redefining the measure of crowding is not without apparent justification.

[8] The Roadmap, filed by defendants on July 2, 2007, also describes the California prison system as "dangerously overcrowded" and its first recommendation is that the CDCR "reduce overcrowding in its prison facilities and parole offices." Roadmap, at viii, 10.

By early 2006, the impact of severe prison overcrowding on the remedial efforts in this case was becoming evident in the record. *See, e.g.,* Fifteenth Monitoring Report of the Special Master on the Defendants' Compliance with Provisionally Approved Plans, Policies and Protocols, filed January 23, 2006, at 396-97 ("Whatever progress was reported in the preceding round of review, or in the early part of the current review, in the timeliness of transfer of [Mental Health Services Delivery System] ("MHSDS") inmates out of reception into general population has been largely cancelled by the recently escalating growth in the overall CDCR population and the concomitantly increasing number of MHSDS inmates in reception."). Since then, the impact of overcrowding has become even more clear. *See, e.g.,* Special Master's Supplemental Report on the Status and Sufficiency of Defendants' Interim and Long Term Plans for the Provision of Acute and Intermediate Inpatient Beds and Mental Health Crisis Beds, filed September 11, 2006, at 11 ("The sudden addition of an unanticipated 1,300 inmates to a correctional system perilously close to 200 percent of its design capacity and a commensurately overstressed mental health care delivery system operating way beyond its capacity represents an unexpected, projection-rattling variable.").

Following the initial hearing on the instant motion, the court continued the matter for six months. *See* Order filed December 12, 2006. That continuance was for the purpose of allowing the State to develop its own solution to the overcrowding crisis. During that six month period, the California Legislature enacted Assembly Bill 900 ("AB 900"), and the bill was signed into law by Governor Schwarzenegger. The legislation calls for, *inter alia*, construction of

24,000 new prison beds in Phase I of its implementation, and 16,000 new prison beds in Phase II. Defendants aver that 12,000 of the Phase I beds "will be completed in 2009." Declaration of Deborah Hysen in Support of Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Referral to a Three-Judge Panel, filed May 24, 2007, at ¶ 8. Construction funds for Phase II are tied to progress in specific areas, including construction, rehabilitation programs, management planning, and parole review. The legislation also calls for transfer of 8,000 inmates to out of state prisons by March 2009, with continued transfers as needed until July 2011. Defendants contend that the passage of AB 900 renders unnecessary and inappropriate referral of this matter to a three-judge panel.

As of May 11, 2007, the prison population in California totaled 174,989 inmates, of which approximately 162,848 are male and 12,141 are female. *See* Special Master's May 31, 2007 Response, at 2. Defendants estimate that the male prison population in California[9] will be 159,939 male inmates in March 2008 and 162,674 male inmates in March 2009. Declaration of Scott Kernan in Support of Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Referral to a Three Judge Panel, filed May 24, 2007, at ¶ 22. The record suggests there will be no appreciable change in the prison population in the next two years.

Defendants plan to add 12,000 prison "in-fill" beds by 2009. *See* Hysen Declaration, at ¶ 8. According to defendants, "[i]n-fill beds will provide additional

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[9] These numbers do not include inmates who will be transferred out of state. *See* Kernan Declaration, at ¶ 23.

capacity at existing prisons in a way that ensures proper facilities, support and services." *Id.* It is not at all clear, however, that an additional 12,000 beds, even if timely completed, will alleviate the population crisis. As noted above, in June 2004 the independent panel on corrections found that a male inmate population of approximately 141,000 exceeded by 4,000 the "safe and reasonable" capacity of the California prison system and by 30,000 the system's "operable" capacity. The male prison population projected for March 2009 is over 162,000 inmates and exceeds the population analyzed in the 2004 report by approximately 21,000 inmates, or 9,000 more inmates than new beds planned. Moreover, of course, this utterly fails to address the critical question of staffing.

AB 900 provides for the construction of 8,000 medical and mental health beds as a "high priority." Hysen Declaration, at ¶ 10. Defendants, however, are unable to adequately staff the mental health beds that presently exist and are experiencing severe staffing shortages at every level of the mental health care delivery system. *See* Seventeenth Monitoring Report, Part C, at 161-64. From all that presently appears, new beds will not alleviate this problem but will aggravate it.

AB 900 also includes provisions for rehabilitation programs and planning. *See* Declaration of Joan Petersilia, Ph.D. in Support of Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Referral to a Three-Judge Panel, filed May 24, 2007. Defendants have formed an Expert Panel and a Rehabilitation Strike Team to review existing rehabilitation programs and make recommendations for improvement of those programs. *Id.* at ¶¶ 3-5. Defendants "anticipate" that "if CDCR fully imple-

ments" these recommendations, the rate of parolees returning to custody could decrease by as much as 10%, or 8,100 inmates. *Id.* at ¶ 10.

Plaintiffs challenge, *inter alia*, the representations made by defendants concerning the impact of this provision of AB 900 on prison overcrowding. To this end, plaintiffs have presented the declaration of an individual with thirty years in corrections planning and research who is a member of the Expert Panel referred to in Dr. Petersilia's declaration. *See* Declaration of James Austin, Ph.D. in Support of Plaintiffs' Supplemental Reply Brief, filed June 1, 2007. In his declaration, Dr. Austin contends, *inter alia*, that Dr. Petersilia's estimate is incorrect for a number of reasons and that even if 8,100 parolees do not violate their parole that will only save 2,000 beds per year. Austin Declaration, at ¶ 16. Dr. Austin also opines that "under the best of circumstances it would take two to five years to design and begin to operate rehabilitation services." *Id.*

The Roadmap, filed by defendants on July 2, 2007, "provides an assessment of the state of correctional programming in California's adult prison and parole systems" and "includes recommendations intended to guide California in creating a model rehabilitation programming system." Roadmap, at vii. The panel suggests that if all of the recommendations contained in the Roadmap are adopted, "the state may significantly reduce the large number of parolees who are currently violating their parole conditions and being returned to prison." *Id.* at xiv. The Roadmap also contains recommended "strategies that would reduce the number of prison beds that California needs by 42,000 to 48,000." *Id.* The Roadmap contains a two year timeline for implementing its major program-

ming recommendations. *Id.* at 54 and Appendix K. Indeed, "resolving" prison overcrowding is described as a "precondition" to these efforts. *Id.* at xv.

It is clear that the Roadmap represents a preliminary, rather than an advanced, stage of implementation of this aspect of AB 900. *See, e.g.*, Decl. of Joan Petersilia in Support of Defendants' Additional Briefing On Plaintiffs' Motion to Convene Three-Judge Court, at ¶ 12. While parts of the Roadmap may be appropriate for consideration by a three-judge court, neither it, nor any of the other material presented by defendants, contain a sufficiently immediate response to the crisis in prison overcrowding that is presently preventing the delivery of constitutionally adequate mental health care to members of the plaintiff class.

Review of the record before this court shows that, through AB 900, the State of California has responded to the prison overcrowding crisis with legislation that requires the construction of thousands of beds to increase the capacity of the prison system, development and staffing of rehabilitation programs to reduce recidivism, and transfer of 8,000 inmates out of state. For the reasons discussed *supra*, none of these efforts will have any appreciable impact on the severely overcrowded prisons in California for at least two years, if then.

As the Special Master reported on May 31, 2007, "[o]ver the past 11-plus years, much has been achieved, and many of the achievements have succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair." Special Master's May 31, 2007 Response, at 17. Given the almost twelve years that this case has been in its remedial phase, and given the constitutional

considerations at stake, the direction in which the State has at present chosen to go by enacting AB 900 simply fails to address in any timely way relief from the overcrowding crisis and its attendant impact.

After careful review of the record in this action, this court has come, with extreme reluctance but firm conviction, to the conclusion that the overcrowding crisis in the CDCR is preventing the delivery of constitutionally adequate mental health care to the plaintiff class and, therefore, that some form of limitation on the inmate population must be considered. For all of the foregoing reasons, plaintiffs' motion will be granted and the court will forthwith request the convening of a three-judge panel pursuant to 18 U.S.C. § 3626(a)(3) and 28 U.S.C. § 2284.

In accordance with the above, IT IS HEREBY ORDERED that plaintiffs' November 13, 2006 motion to convene a three-judge panel to limit the prison population is granted pursuant to 18 U.S.C. § 3626(a)(3)(A). The Clerk of the Court is directed to serve a copy of this order on the Chief Judge of the United States Court of Appeals for the Ninth Circuit. Moreover, for purposes of judicial economy and avoiding the risk of inconsistent judgment, the court recommends that the instant case be assigned to the same three-judge panel requested by the court in *Plata v. Schwarzenegger*, Case No. CIV 01-1351 TEH (N.D.Cal.). The court wishes to again observe that overcrowding is the State's problem and in the interim, the court again urges the State to find its own solution to the crisis.

APPENDIX E

IN THE UNITED STATES DISTRICT COURTS FOR THE EASTERN DISTRICT OF CALIFORNIA AND THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
COMPOSED OF THREE JUDGES

PURSUANT TO SECTION 2284,
TITLE 28 UNITED STATES CODE

[Filed 09/03/09]

No. CIV S-90-0520 LKK JFM P
THREE-JUDGE COURT

RALPH COLEMAN, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

No. C01-1351 TEH
THREE-JUDGE COURT

MARCIANO PLATA, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

ORDER DENYING MOTION TO STAY
AUGUST 4, 2009 ORDER

On August 4, 2009, this court issued an opinion and order finding that plaintiffs had met their burden under the Prisoner Litigation Reform Act, 18 U.S.C. § 3626, to establish that crowding was the primary cause of the constitutionally inadequate medical and mental health care systems at issue in the underlying cases and that a prisoner release order was necessary to remedy those violations. The *Coleman* case, which concerns inmate mental health care, was filed nearly two decades ago and has been in the remedial phase since 1995. The *Plata* case, which concerns inmate medical care, was filed eight years ago and entered the remedial phase in 2002, with a receiver appointed in 2006 after the state's admitted failure to implement agreed-upon reforms. After hearing fourteen days of live testimony commencing on November 18, 2008, and reviewing dozens of trial declarations and expert reports in addition to hundreds of exhibits, this court concluded that crowding was the primary cause of the constitutional violations at issue in both cases and that no relief that did not include a prisoner release order—defined broadly by the statute as any order having "the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison," 18 U.S.C. § 3626(g)(4)—could remedy those violations. We further found, based on the evidence presented at trial, including reports commissioned and proposals made by the state itself, that a prisoner population reduction could be achieved without adversely impacting public safety or the operation of the criminal justice system and that, in fact, California's crowded prisons are criminogenic environments that themselves have a substantial negative impact on public safety.

Rather than ordering any specific mechanisms for reducing California's prison population, we instead ordered defendants to present the court with a plan "that will in no more than two years reduce the population of the CDCR's adult institutions to 137.5% of their combined design capacity." Aug. 4, 2009 Opinion & Order at 183. We determined the order to be narrowly tailored, to extend no further than necessary, and to be the least intrusive means possible to correct the constitutional violations at issue. We also recognized the importance of preserving the state's discretion, as well as the limited role of the federal courts. As we noted near the outset of our opinion, "[w]e recognize the gravity of the population reduction order we issue herein, and we do not intervene in matters of prison population lightly. Nonetheless, when federal court intervention becomes the only means by which to enforce rights guaranteed by the Constitution, federal courts are obligated to act." *Id.* at 9.

Defendants now seek a stay of our order to develop a population reduction plan pending their appeal of that interlocutory order to the United States Supreme Court. In our opinion and order, we stated that we "will not grant any stay of the proceedings prior to the issuance of the final population reduction plan, but will entertain motions to stay implementation of that plan pending the resolution of any appeal to the Supreme Court." *Id.* at 183. In other words, we stated that we would entertain motions to stay our final order once it was issued, to the effect that the state would not be required to put any population reduction order into effect until after the Supreme Court had the opportunity to consider the legality of that order; we also stated, however, that we would not stay any interim order designed to require the

state to help inform this court of its position and to allow the court to develop a plan that would take into account the state's proposals. After carefully reviewing the state defendants' written arguments, we do not find good cause to alter our decision.

As we have explained, our August 4, 2009 order requires simply the development of a plan; it does not require implementation of any population reduction measures. The first step towards the development of a plan is the state's submission of a proposed plan by September 18, 2009. Plaintiffs and intervenors will then have until October 8, 2009, to file any objections to the state's proposal, as well as to propose modifications to the state's proposed plan or suggestions for additional actions. Defendants will then have until October 23, 2009, to file a response to any submissions by the plaintiffs and intervenors.

We have set no fixed time limit for completing the process of developing a final population reduction plan, although time is of the essence, and we may, after considering all of the written submissions, find it necessary to obtain additional information from the parties or intervenors, or to hold further hearings prior to approving a final plan. The state will be required to take no action with respect to implementing any components of a population reduction order until all of these proceedings are completed, and then, should it appeal, we will entertain a motion to stay any action until the Supreme Court has reviewed the final court-ordered plan.

In considering an application for stay, courts must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the

> merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Applying these factors to this case, we first find little, if any, likelihood that the state could prevail on its appeal from our interlocutory order to provide a population reduction plan. To the extent that defendants would seek a stay on the merits of an order to implement any such plan, no such order exists. Moreover, as we have noted, in our August 4, 2009 order, we stated that once a final population reduction plan has been issued, we will entertain motions to stay implementation of the plan pending resolution of an appeal to the Supreme Court. Second, developing a plan to resolve the state-acknowledged crisis in the prisons will not under any circumstances constitute irreparable harm to the state, but will be of benefit to it in its efforts to bring to an end the unconstitutional conditions in its prisons, as well as the detriments that flow therefrom—to the state, its prisoners, the prison guards, and the public. Indeed, the state has already completed much of the necessary work to develop a plan that could satisfy much or all of our order, with the Governor's population reduction proposals having been recently considered and adopted (in full by one house and in part by the other) by the California Legislature. Third, the balance of the equities is in favor of development of a plan rather than in delaying such development for another year or more. Constitutional deprivations are now occurring and are adversely affecting the health and mental health of many thousands of prisoners in the California prison system. Plaintiffs have been seeking relief

from these deprivations for almost two decades, and, under the terms of our August 4, 2009 order, the state will have two more years to resolve crowded prison conditions once a final plan is ordered by this court, even aside from any delay resulting from a stay issued pending appeal on the merits and the final resolution of the matter by the Supreme Court. No equitable purpose whatsoever could be served by further delays in formulating a plan. Finally, the public interest lies in the state's making progress towards resolving its prison crisis, which includes the undisputed crowding that led the Governor to declare a state of emergency in 2006 that remains in effect to date. Development of a population reduction plan can only further this process and, thus, the public interest.[1]

This court has been more than patient with the state and its officials. Throughout the proceedings, we have had considerable difficulty in determining their positions, in view of their conflicting representations before this and other official bodies. We are persuaded that it is now in the best interests of all concerned to act as swiftly as possible. Further delays and obstruction will not well serve the people of the state, and will not be tolerated by this court.

For all of the above reasons, Defendants' motion to stay this court's August 4, 2009 order to develop a population reduction plan is DENIED.

IT IS SO ORDERED.

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[1] Were we to apply the *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008), test for the issuance of a preliminary injunction to the stay sought here, we would reach precisely the same result with respect to each of the four factors.

DATED: 09/03/09

By: /s/ Stephen Reinhardt
STEPHEN REINHARDT
United States Circuit Judge
Ninth Circuit Court Of Appeals

DATED: 09/03/09

By: /s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Senior United States District Judge
Eastern District of California

DATED: 09/03/09

By: /s/ Thelton E. Henderson
THELTON E. HENDERSON
Senior United States District Judge
Northern District of California

APPENDIX F

IN THE UNITED STATES DISTRICT COURTS FOR THE EASTERN DISTRICT OF CALIFORNIA AND THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
COMPOSED OF THREE JUDGES

PURSUANT TO SECTION 2284,
TITLE 28 UNITED STATES CODE

No. 2:90-cv-00520 LKK JFM P
THREE-JUDGE COURT

RALPH COLEMAN, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

No. C01-1351 TEH
THREE-JUDGE COURT

MARCIANO PLATA, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

DEFENDANTS' POPULATION
REDUCTION PLAN

To: Three-Judge Court

On August 4, 2009, the Three-Judge Court ordered Defendants to "provide the Court with a population reduction plan" within 45 days. (*Plata* Doc. 2197.) Defendants filed a notice of appeal and request for stay in the U.S. Supreme Court. (*Plata* Doc. 2224.) The stay was denied by the U.S. Supreme Court on September 11, 2009; the appeal is still pending and a jurisdictional statement will be filed in due course. Therefore, as required by the Three-Judge Court's order, Defendants submit the attached "population reduction plan." (*See* Exhibit A.) Defendants also submit "California Department of Corrections and Rehabilitation Achievements & Improvements Introduced During Three-Judge Court Proceeding." (*See* Exhibit B.)

The submission of the attached "population reduction plan," as required by the Three-Judge Court, is not an admission that this Court's order meets the requirements of the Prison Litigation Reform Act (PLRA). As will be argued in the U.S. Supreme Court, the Three-Judge Court erred in its rulings and orders. Thus, the submission of this plan does not constitute waiver of any issue previously raised before this Court and which may be raised in the U.S. Supreme Court, including, but not limited to, whether the three-judge court was properly convened; whether the Court misconstrued the PLRA's requirement that crowding is the primary cause of the violation of a federal right; whether the population cap of 137.5% satisfies the PLRA's "least intrusive" and "narrowly drawn" requirements; and whether the Court improperly refused to permit the State from introducing evidence "relevant only to determining whether the constitutional violations

found by the *Plata* and *Coleman* courts were 'current and ongoing.'"

Dated: September 18, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
JONATHAN L. WOLFF
Senior Assistant Attorney General

/s/ Kyle A. Lewis

KYLE A. Lewis
Deputy Attorney General
Attorneys for Defendants

HANSON BRIDGETT LLP

/s/ Paul B. Mello

PAUL B. MELLO
Attorneys for Defendants

EXHIBIT A

September 18, 2009 Plan for Prison Population Management as Required by the August 4, 2009 Court Order

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PURPOSE AND BACKGROUND

On August 4, 2009, this Court ordered the *Coleman v. Schwarzenegger* and *Plata v. Schwarzenegger* defendants (State Defendants) to "provide the court with a population reduction plan that will in no more than two years reduce the population of the CDCR's [California Department of Corrections and Rehabilitation's] adult institutions to 137.5% of their combined design capacity." Without waiving any appellate rights, State Defendants present this submission to the Three-Judge Court as required by the August 4, 2009 Order.

This "population reduction plan" (Plan) foremost represents the State's course of action to reform the State's prison policies and system. It also outlines the corresponding decrease in prison population that will occur as a result of the reforms identified in the plan. The following list of reforms, which are described in greater detail below, have either been implemented since the Three-Judge Court trial ended in December 2008, or will be implemented due to recent legislation that the Administration worked with the Legislature to obtain:

- Implemented the Parole Violation Decision Making Instrument Statewide. *Using scientific research to make evidenced-based decisions to send low risk offenders to appropriate programs and high risk offenders back to prison.*

- Discharged Deported Parolees. *Eliminated the wasteful and costly supervision for over 12,000 offenders who should be prosecuted by federal, not state, authorities if they illegally return.*
- Parole Reform. *New legislation aimed at reducing the churning and providing for better, targeted parole supervision of the State's most dangerous offenders.*
- Enhanced Credit Earning. *New legislation that encourages the completion of rehabilitative programs.*
- Community Corrections. *New legislation will provide fiscal incentives to keep low-level offenders local rather than returning them to prison.*
- Parole Reentry Courts. *New legislation that allows for intensive monitoring for parole violators in the community rather than returning them to prison.*
- Increasing the Number of Inmates Housed Out-Of-State. *Increasing the total number of inmates housed at out-of-state institutions, which currently stands at approximately 8,000.*
- AB 900 Amendments. *Recent legislation allows for funding and construction to start. Defendants prevailed in litigation that tried to stall construction.*
- Developed Bed Plan Which Will Increase Capacity to Address Crowding and Health Care Concerns. *Includes new level IV infill, new healthcare infill, reception center beds,*

mental health beds, reentry facilities, and the conversion of Department of Juvenile Justice facilities.

- Expanding and Improving Clinical Care at Existing Prisons. *Addressing health care capacity concerns including clinical and program space by allocating $500 million in AB 900 money.*

Since the time of this Court's tentative ruling and with even greater urgency since August 4, 2009, the State Defendants have studied a variety of measures that would reduce the prison population. The State Defendants believe that reducing the prison population to 137.5% within a two-year period cannot be accomplished without unacceptably compromising public safety. However, the Plan submitted here proposes mechanisms to safely reach a population level of 137.5% over time, and will achieve a more efficient capacity within 2-3 years than there is presently.[1]

The Plan has three parts: (1) the Plan describes recently obtained legislative authority and administrative changes designed to reduce the prison popula-

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[1] That it is theoretically possible to reduce the prison population to 137.5% within two years says nothing about whether it would satisfy all of the PLRA's requirements to do so. For instance, a plan calling for the release of one in every four inmates at random or that inmates draw lots for their release would allow the 137.5% figure to be achieved within two years, if not instantaneously. But there is no doubt that such measures are not required by, much less would they satisfy, the PLRA because, among other reasons, they would provide no assurance of public safety. Thus, to submit a plan that would achieve the full population reduction within two years, without ensuring that the other requirements of the PLRA are satisfied, would be far less appropriate than the plan submitted here.

tion; (2) the Plan describes the construction projects both underway and planned that will, upon completion, increase housing capacity and services to the severely mentally and/or medically ill populations housed in CDCR's instate adult institutions; and (3) the Plan addresses additional planned legislative reforms. CDCR estimates that when it implements the reforms for which it already has authority, the average daily prison population (ADP) at CDCR's adult instate institutions will be reduced by approximately 28,000 in three years. This reduction will result in an estimated population of approximately 155% at the existing 33 adult institutions. The State Defendants anticipate that in five years, the ADP will be reduced by approximately 34,000 resulting in an estimated population of approximately 147%. Moreover, if the Administration's planned legislative reforms are enacted, the crowding rate at the institutions would fall to 139% after three years, and 132% after five years.

Not only will the State lower its population through smart prison reforms and increase operational capacity through prison construction, the State is also committed to building beds specifically for the *Plata* and *Coleman* class members to accelerate the already dramatic improvements in the delivery of healthcare to CDCR's inmate-patients. In fact, over 5,800 beds will be built with the specific and focused purpose of benefiting the class members of these cases. These beds are in addition to approximately 3,700 beds that will be constructed to meet general population needs at existing prisons, and 8,000 beds in reentry facilities throughout the state. Moreover, the general population and reentry beds will also have a full complement of healthcare space. Additionally, the State plans to spend roughly a half

billion dollars in a healthcare improvement project at some of the existing institutions, which will accelerate the already dramatic improvements in healthcare delivery. Finally, these efforts will improve the operable capacity in CDCR's adult instate institutions which will, in turn, improve the rate of capacity in which CDCR can appropriately double cell inmates.

Lastly, this Plan represents current day projections. Future events and circumstances, including, but not limited to, further economic downturns, an increase in crime, voter-approved changes to the criminal justice system, and other unanticipated events, may require changes to this Plan.

I.

LEGISLATIVE AND ADMINISTRATIVE REFORMS

A. PRE-CUSTODY REFORMS: California Community Corrections Performance Incentives Act of 2009

California typically sends about 19,000 probation violators to prison each year, representing approximately 40% of all new prison admissions from the courts.[2] Unfortunately, California's prior funding model encouraged this high rate of probation failure. According to a recent report by the Legislative Analyst's Office, California's funding model provided "an unintended incentive for local agencies to revoke probation failures to state prison instead of utilizing alternative community-based sanctions."[3] That same report recommended that California instead establish

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[2] "Achieving Better Outcomes For Adult Probation," Legislative Analyst's Office (May 29, 2009) at 20.

[3] *Id.* at 3.

a fiscal incentive program for probation success so that California could reduce the number of probationers entering the state prison system by rewarding those probation departments that demonstrate success.

The recent passage of Senate Bill 18 (SB 18)[4] creates exactly such a system of rewards for probation success. It establishes the California Community Corrections Performance Incentives Act of 2009. The community corrections program created by this act will authorize counties to receive funding for implementing and expanding evidence-based programs for felony probationers. Counties will be required to track specific probation outcomes and, depending on the success of those outcomes, may be eligible for "probation failure reduction incentive payments" or "high performance grants."

The new funding model created by SB 18 will provide sustainable funding for improved, evidence-based probation supervision practices. By incentivising probation success, California will lower the number of probationers sent to prison each year.

State Defendants estimate this program will net an approximate 1,915 reduction in CDCR's ADP once fully implemented in or about Fiscal Year 2010-2011.

B. IN-CUSTODY REFORMS: Credit Earning Enhancements

The passage of SB 18 also provides a number of credit earning enhancements. First, it provides one day of sentence credit for every day served in county jail from the time of sentencing. Current law provides one day of credit for every two days served in county jail. Second, it provides eligible inmates up to six

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[4] Sen. Bill No. 18 (2009 3d Ex. Sess.)

weeks of credit per year for completion of approved programs. This approach to incentivising good behavior for program completions has been suggested by several experts including the Expert Panel Report. Third, it provides that all parole violators returned to custody who are otherwise eligible should receive one day of credit for each day served. Currently, only some violators receive such credit. Fourth, it provides two days of credit for every one day served once the inmate is endorsed to transfer to a fire camp, rather than providing such credit only after the inmate actually participates in the camp. Finally, it provides a consistent rule of one day of credit for every day served for all eligible inmates, whether those inmates are on a waiting list for a full-time assignment, participating in college, or undergoing reception center processing, so long as the inmate is discipline-free during that time. Current law provides a similar credit structure, but does so through the existence, for example, of a "bridging program," whereby inmates in reception centers sign up for self-study programs and receive credit. This legislation makes credit earning consistent while obviating the need for a bridging program.

State Defendants estimate this program will net an approximate 4,556 reduction in CDCR's ADP once fully implemented in or about Fiscal Year 2010-2011.

C. PAROLE REFORMS

1. "Summary Parole"

The enactment of SB 18 creates a new program of "summary parole" whereby CDCR is prohibited from returning to prison, placing a parole hold, or reporting to the Board of Parole Hearings, any parolee who meets all of the following conditions: (1) is not a sex

offender[5]; (2) has not been committed to prison for a sexually violent offense[6]; (3) has no prior conviction for a sexually violent offense; (4) has no instant or prior convictions that are violent[7] or serious[8]; (5) has not been found guilty of a serious disciplinary offense as defined by CDCR during his or her current term of imprisonment; (6) is not a validated prison gang member or associate, as defined in CDCR regulations; (7) has not refused to sign any written notification of parole requirements or conditions; and (8) has not been determined to pose a high risk to reoffend pursuant to a validated risk assessment tool.[9] All other offenders will be subject to traditional parole supervision upon release from prison.

The State Defendants anticipate that "summary parole" will reduce CDCR's institutional population because, when fully implemented, CDCR will be precluded from revoking parole and returning approximately 35,000 parolees to prison for parole violations.

Defendants estimate this program will net an approximate 4,180 reduction in CDCR's ADP once fully implemented in or about fiscal Year 2010-2011.

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[5] California Penal Code, § 290, et seq. Subsequent references will be to the Penal Code unless otherwise noted.

[6] California Welfare and Institutions Code section 6600, subd (b).

[7] § 667.5, subd. (c).

[8] § 1192.7, subd. (c).

[9] CDCR intends to employ the California Static Risk Assessment tool, a validated tool that predicts an offender's risk to reoffend on the basis of static information received from CDCR and the California Department of Justice.

2. The Parole Violation Decision Making Instrument

SB 18 requires that CDCR employ a parole violation decision making instrument (PVDMI) to determine the most appropriate sanctions for parolees who violate conditions of parole. The instrument standardizes departmental decision-making by properly accounting for both the severity of the parole violation and the offender's risk to reoffend as determined by a validated risk assessment tool. This legislation comports with the recommendations of numerous expert reports, including the Rehabilitation Strike Team Report to the Governor, the California Expert Panel Report, and the Little Hoover Commission.

In fact, CDCR has already developed precisely such a tool and will have it fully deployed and in use throughout the State prior to the effective date of SB 18. CDCR's PVDMI receives risk information from the California Static Risk Assessment (CSRA), a validated risk assessment tool developed by CDCR in conjunction with the University of California, Irvine, Center of Evidence-Based Corrections. The CSRA predicts recidivism based on static demographic and criminal history information received from the California Department of Justice. The use of the PVDMI allows CDCR to preserve correctional resources by maximizing the use of alternative parole violation sanctions while reserving incarceration for only the most dangerous parolees for whom the scientific research dictates such a result. CDCR's pioneering work in both developing the CSRA and employing it as part of the CDCR's PVDMI has been recognized by the California Administrative Office of the Courts, which has asked CDCR to assist in the development of the Courts' own risk assessment tool.

Although CDCR will not identify a population reduction associated with this reform at this time, the PVDMI is an effective tool in placing parolees in the right programs and returning the high risk parole violators to prisons thereby increasing public safety while decreasing recidivism.

3. Reentry Courts

SB 18 also authorizes CDCR to collaborate with the California Administrative Office of the Courts to establish and expand drug and mental health reentry courts for parolees. These reentry courts will provide an option for parolees with drug and mental health needs to receive highly structured treatment in the community, under the close supervision of their parole agent and the court, rather than being returned to prison for violations that may be related to those needs. The legislation provides that for participating parolees, the court, with the assistance of the parolee's parole agent, "shall have exclusive authority to determine the appropriate conditions of parole, order rehabilitation and treatment services to be provided, determine appropriate incentives, order appropriate sanctions, lift parole holds, and hear and determine appropriate responses to alleged violations." The court proceedings will feature a dedicated calendar, non-adversarial proceedings, and a highly structured approach featuring frequent drug and alcohol testing to ensure the best chance of parole success.

The implementation of the reentry courts should have a significant impact on reducing the number of mentally ill inmates in CDCR because it should reduce the number of parolees with mental illness returning to prison.

State Defendants estimate this program will reduce CDCR's ADP by approximately 435 inmates once fully implemented in or about Fiscal Year 2010-2011.

D. ADMINISTRATIVE CHANGES

1. California's Out-of-State Correctional Facility Expansion

Defendants will expand the California Out-of-State Correctional Facility (COCF) program, which has as its primary purpose removing non-traditional beds and relieving crowding by transferring CDCR inmates to contracting out-of-state facilities. The COCF program has been in place since October 2006 and CDCR currently maintains approximately 8,000 inmates in out-of-state facilities. CDCR intends to expand the program to allow transfer of additional inmates out-of-state. CDCR maintains a robust quality assurance system over the program to ensure all inmates transferred out-of-state are able to obtain all appropriate services.

State Defendants estimate this program will net an additional approximate 1,250 reduction in CDCR's ADP in or about Fiscal Year 2009-2010, a 2,200 total reduction in CDCR's ADP in or about Fiscal Year 2010-2011, and a 2,500 total reduction in CDCR's ADP once fully implemented in or about Fiscal Year 2011-2012.

2. Community Correctional Facilities Utilization

State Defendants intend to better utilize existing private Community Correctional Facilities (CCF's) to assist in the reduction of the prison population. CDCR established thirteen CCFs throughout California to house low-level inmates. CCFs prepare

these inmates for their return to the community on parole. Robust oversight of the CCFs is already in place. However, CCFs have been underutilized by CDCR in the past, primarily because appropriate male inmates are also eligible for other types of housing, including minimum security facilities and camps. Yet, there is an abundance of female inmates who are eligible for placement into these facilities. Recognizing this, CDCR intends to increase its use of CCFs by converting three CCFs to female facilities.

State Defendants estimate this program will net an approximate 800 inmate reduction in CDCR's ADP once fully implemented in or about Fiscal Year 2010-2011.

3. Commutations of Sentence

The Governor will review cases of certain deportable inmates under his discretionary constitutional clemency authority. A commutation of sentence would result in an inmate's early release from prison and deportation.

Defendants estimate this program will reduce CDCR's ADP by approximately 600 once fully implemented.

4. Discharge of Deported Parolees

Earlier this year CDCR implemented a new policy to discharge from parole the over 12,000 criminal aliens who have served their full state prison sentences and, upon release to parole, have been deported by the federal government. Previously, California had retained those criminal aliens on parole, even after their deportation. Under CDCR's new policy, those parolees have been discharged and additional parolees will be discharged from parole on an ongoing basis as CDCR receives confirmation of

their deportation from the federal government. This new policy has resulted in fewer parolees being returned to state prison for parole violations and provides an incentive for federal prosecution of these offenders.

State Defendants estimate this policy will net an approximate 271 reduction in CDCR's ADP once fully implemented in or about Fiscal Year 2010-2011.

5. Alternative Sanctions for Violations of Parole

CDCR will make greater use of electronic monitoring systems such as global positioning systems (GPS), for parole violators in lieu of revocation and re-incarceration. The expanded use of GPS and other electronic monitoring systems will permit CDCR to monitor those offenders outside of state prison for parole violations.

State Defendants estimate this program will net an approximate 119 reduction in CDCR's ADP in or about Fiscal Year 2009-2010, a 891 reduction in CDCR's ADP in or about Fiscal Year 2010-2011, and a 1,000 reduction in CDCR's ADP once fully implemented in or about Fiscal Year 2011-2012.

II.

INCREASED CAPACITY

Assembly Bill 900 (AB 900) was passed by a bipartisan Legislature and signed into law by Governor Schwarzenegger on May 3, 2007. AB 900 allocates $7.6 billion, of which $6.4 billion is designed to reform CDCR by reducing prison overcrowding, increasing rehabilitation programs, and providing more beds for all inmates, including those requiring medical and mental health care. AB 900's comprehensive plan immediately relieved overcrowding by

providing for additional out-of-state transfers, which are authorized to continue until July 1, 2011. AB 900 also provides for new rehabilitation programs and reentry facilities to ease parolees' transition back into California communities, thereby reducing recidivism, relieving prison overcrowding, and ensuring public safety.

A. INFILL PROJECTS

Construction projects will result in new annex housing units and renovation of existing facilities. These projects will add bed capacity as well as additional office and treatment space to relieve operational pressures throughout CDCR institutions.

Newly constructed facilities are planned in standalone units and will operate semi-autonomously from the main institutions, though some space and/or functions, such as administrative services, may be shared by the main institutions to ensure the newly constructed facilities are fully serviced. Each newly constructed facility will have appropriate programming space and staffing for the population to be served.

Renovated facilities primarily represent current or former juvenile correctional facilities that are being repurposed to serve an adult male population. All renovated facilities will also provide for the reduction of nontraditional beds, and will have the requisite amount of programming space and staff for their intended populations. A description of each project follows by phase of funding as outlined in AB 900.[10]

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[10] CDCR is currently pursuing legislation to redirect $1 billion from its infill funding appropriation under AB 900 to the healthcare funding appropriation. The figures set forth in this Plan assume (and require) passage of that legislation and that

There are a few projects that are not funded through the AB 900 appropriation and those projects are noted.

1. Kern Valley State Prison

This project will result in 930 new beds in a Level IV semi-autonomous facility at the existing Kern Valley State Prison site, with the addition of five housing units on 33 acres using the 270 design celled-bed prototype. This construction will include space for rehabilitative programming (i.e., vocational, academic, substance abuse), work opportunities, and a health services building of approximately 22,000 square feet. A portion of these beds will be wheelchair-compliant beds.

This project will be submitted to the Joint Legislative Budget Committee (JLBC) for its approval in Fall 2009 with a request for State Public Works Board (PWB) approval and interim financing from the Pooled Money Investment Board (PMIB) to immediately follow. Necessary environmental impact review (EIR) documents are already underway. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, these beds should come on line in or about Fiscal Year 2012-2013.

2. Heman G. Stark Conversion

This project renovates an existing 1,200-cell Department of Juvenile Justice facility in Chino. It includes the installation of design elements necessary to house an adult male population (i.e., lethal electrified fence, guard towers, etc.), ADA improvements,

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the proposed consolidated care center facility will be funded with the $1 billion in funds redirected from the infill appropriation.

expanded or new administrative support buildings, and a new health services building. This plan provides for double-celling a portion of the facility and envisions approximately 1,800 beds. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, 700 beds should come on line in or about Fiscal Year 2009-2010, and 1,100 beds in or about Fiscal Year 2010-2011.

3. Reception Center—Southern California

This project will result in 943 new beds in a cell-design semi-autonomous facility with five housing units, including the support space necessary to house reception center inmates. This project will also include a health services building to accommodate this population. Its location will be at one of the Southern California prisons where CDCR's need for additional reception center beds is greatest. A portion of these beds will be wheelchair-compliant beds.

The Reception Center Prototype initial planning is complete and siting options are underway. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, these beds should come on line in Fiscal Year 2012-2013.

4. Department of Juvenile Justice Conversion—Paso Robles

This project renovates a former juvenile justice facility located in Paso Robles. This facility currently includes both dorms and an existing 270-celled prototype. The intended capacity is approximately 899 beds which includes some double-ceiling of the population. This is intended for a general population facility with a health-care mission and will serve elderly inmates with healthcare needs. The scope of

work would include a new lethal electrified fence to increase the security level of the facility from a Level I to a Level II, as well as building code updates, ADA improvements, and an expanded healthcare facility. A portion of these beds will be wheelchair-compliant beds.

This project will be submitted to the JLBC in Fall 2009 for approval and will subsequently be submitted to the State PWB and the PMIB for approval and financing. The EIR document is already underway. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, these beds should come on line in Fiscal Year 2011-2012.

5. Wasco State Prison—Level IV Celled Facility

This project builds a 1,896 bed Level IV semi-autonomous celled facility based on CDCR's 180-design prototype. This project includes eight housing units, support and programming space planned for available land located on the unused land at the existing prison in Wasco. This project will also include a Correctional Treatment Clinic (CTC) to serve the population and a portion of the overall beds will be wheelchair-compliant.

This project is currently proposed for funding in Phase 2 of AB 900. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, these beds should come on line in Fiscal Year 2012-2013.

6. Department of Juvenile Justice Conversion—Northern California

This project renovates a former juvenile justice facility located in Northern California at a site to be determined. The intended capacity is approximately

1,133 beds which includes some double-ceiling of the population. The facility is intended for a general population facility with a health care mission and will serve inmates with medical outpatient needs and inmates requiring Enhanced Outpatient Program mental health services. CDCR is consulting with the *Plata* Receiver to identify an appropriate site and the appropriate scope for the project.

This project is currently proposed for funding in Phase 2 of AB 900. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, these beds should come on line in Fiscal Year 2013-2014.

B. HEALTHCARE PROJECTS

The healthcare projects described below include renovation and expansion of existing facilities to add housing, office, and/or treatment space to further meet the healthcare needs of CDCR's adult inmates at its existing prisons. Several of these projects are being constructed pursuant to specific court orders. Also, many of these projects are being planned in consultation with the *Plata* Receiver.

1. Northern Consolidated Care Facility

This project provides for a large healthcare facility serving a medical and mental health population to include specialized housing, treatment, and support space at a location in Northern California to be selected among several sites that have already been identified and for which environmental documents are underway. This facility would provide approximately 1,702 new beds serving high acuity medical and mental health patients. If requisite approvals are obtained, there are no legal challenges, and there are

no construction delays, these beds should come on line in or about Fiscal Year 2011-2012.

2. San Quentin State Prison—Correctional Treatment Center (Building 22)

This project is a renovation and replacement of the existing infirmary at San Quentin State Prison and will include a Correctional Treatment Center providing 41 medical and mental health beds. Assuming no obstacles arise, anticipated completion is in or about January 2010.

3. California Men's Colony—Mental Health Crisis Beds

This project builds a 50-bed mental health crisis facility on available land at the California Men's Colony in San Luis Obispo. This project scope and schedule are being coordinated with the Special Master in the *Coleman* case. Assuming no obstacles arise, anticipated completion is in or about October 2012.

4. California State Prison, Lancaster—Enhanced Outpatient Program

This project builds additional treatment and office space to increase by 150 the number of Enhanced Outpatient Program mental health inmate patients served at California State Prison, Lancaster. This project's scope and schedule are being coordinated with the Special Master in the *Coleman* case. Assuming no obstacles arise, anticipated completion is in or about September 2012.

5. California Medical Facility—Intermediate Care Facility

This project builds a 64-bed Intermediate Care Facility to serve mental health patients on the

grounds of the California Medical Facility. This project scope and schedule are being coordinated with the Special Master in the *Coleman* case. Assuming no obstacles arise, anticipated completion is in or about November 2012.

6. California Medical Facility—Enhanced Outpatient Program

This project builds office and treatment space to serve 658 Enhanced Outpatient Program mental health inmate patients on the grounds of the California Medical Facility. This project's scope and schedule are being coordinated with the Special Master in the *Coleman* case. Assuming no obstacles arise, anticipated completion is in or about April 2013.

7. California State Prison, Sacramento—Enhanced Outpatient Program.

This project builds office and treatment space to serve 192 Enhanced Outpatient Program mental health inmate patients on the grounds of California State Prison, Sacramento. This project scope and schedule are being coordinated with the Special Master in the *Coleman* case. This project is not funded through AB 900. Assuming no obstacles arise, anticipated completion is in or about November 2011.

8. San Quentin State Prison—Condemned Inmate Complex Correctional Treatment Center

This project builds 1,152 beds in a new Condemned Inmate Complex on the grounds of San Quentin. This project will include a Correctional Treatment Center serving the medical and mental health needs of the inmate population. CDCR will submit this project for funding in Fall of 2009 and expects to award contracts and break ground in March 2010. This project is not funded through AB 900. Assuming no

obstacles arise, anticipated completion is in or about Fiscal Year 2011-2012.

9. Salinas Valley State Prison—Enhanced Outpatient Program

This project intends to add office and treatment space to serve 96 Enhanced Outpatient Program mental health inmate patients on the grounds of Salinas Valley State Prison. This project's scope and schedule are being coordinated with the Special Master in the *Coleman* case. This project is not funded through AB 900. Assuming no obstacles arise, anticipated completion is in or about April 2013.

10. California Institute for Women—Psychiatric Services Unit

This project intends to renovate existing housing at the California Institute for Women in Chino to provide housing and treatment for a 20-bed Psychiatric Services Unit serving the mentally ill offender population. This project scope and schedule are being coordinated with the Special Master in the *Coleman* case. This project is not funded through AB 900. Assuming no obstacles arise, anticipated completion is in or about February 2011.

11. California State Prison, Sacramento—Psychiatric Services Unit

This project provides office and treatment space to serve 152 Psychiatric Services Unit mental health inmate patients on the grounds of the California State Prison, Sacramento. This project scope and schedule are part of the construction projects proposed in the *Coleman* case.

12. Salinas Valley State Prison—Enhanced Outpatient Program Administrative Segregation Unit

This project was originally planned to add both housing and treatment space to serve approximately 72 Enhanced Outpatient Program mental health inmate patients in the administrative segregation unit at Salinas Valley State Prison. The scope of the project as developed by CDCR has been denied by the Joint Legislative Budget Committee, which directed CDCR to develop an alternative that would provide only office and treatment space for that population. CDCR is currently exploring alternate options to comport with this direction. CDCR will seek relief from the *Coleman* court to modify the project as appropriate.

13. California State Prison, Corcoran—Enhanced Outpatient Program

This project will add office and treatment space to serve an additional 45 Enhanced Outpatient Program mental health inmate patients on the grounds of California State Prison, Corcoran. This project's scope and schedule are being coordinated with the Special Master in the *Coleman* case.

14. Southern California Crisis Beds

This project will site a new 50-bed crisis facility at either the Heman Stark facility in Chino or another Southern California prison. These beds were to be located initially at the Consolidated Care Facility. However, given the need to add additional crisis beds in Southern California, this project is now a stand-alone unit. State Defendants intend to consult with the Special Master in the *Coleman* case. If requisite approvals are obtained, there are no legal challenges, and there are no construction delays, these beds

should come on line in or about Fiscal Year 2012-2013.

15. California Institute for Women—45 Bed Intermediate Care Facility

This project will build a new 45-bed intermediate care facility at the California Institute for Women to serve the mental health population for female adults in the custody of CDCR. Preliminary plans are complete with this project and it is currently in the working drawings phase, with construction to be funded by AB 900 funds. This project's scope and schedule are being coordinated with the Special Master in the *Coleman* case. State Defendants are currently evaluating their long-term need for this project.

C. REENTRY PROJECTS

Pursuant to AB 900, reentry projects provide for the design and operation of secure community reentry facilities located in communities throughout the state. These facilities will hold a maximum of 500 inmates who are within 6-12 months of being released. These facilities will be autonomous facilities and have been designed to facilitate an intensive rehabilitative programming environment and include healthcare treatment space for the population to be served.

To date, eleven counties have agreed to locate a reentry facility to serve their population. The first reentry facilities are being planned in the counties of Kern, Madera, San Joaquin (to also serve Amador and Calaveras), San Luis Obispo (to also serve Santa Barbara and San Benito), and San Bernardino. A reentry facility planned for San Diego is currently being sited. Additional counties have expressed

interest in supporting reentry facilities in their communities.

Assuming no obstacles arise, Defendants estimate this program will build approximately 500 beds in or about Fiscal Year 2010-2011, 2,500 additional beds in or about Fiscal Year 2012-2013, 2,500 additional beds in or about Fiscal Year 2013-2014, and 2,500 additional beds in or about Fiscal Year 2014-2015.

III.

ADDITIONAL LEGISLATIVE REFORMS

This Administration has demonstrated its willingness to reform the State's prisons, and the Administration will continue to push for meaningful reforms like the reforms adopted in SB 18. The following reforms, however, cannot be accomplished administratively, and they will require legislative changes.[11]

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[11] The Court's August 4, 2009 order stated, "[s]hould any of defendants' proposed population reduction measures require the waiver of any provisions of state law, the state shall so advise the court, and shall explain why the requested waiver is permissible under 18 U.S.C. § 3626(a)(1)(b)." This Court did not permit Defendants to introduce evidence regarding whether there are any current and ongoing violations of federal rights. Plaintiffs were also not required to prove, nor did they prove, that there are any current and ongoing violations. Thus, the State Defendants do not assert that state law waivers are permissible here, because State Defendants believe that the statutory requirements authorizing such waivers have not been satisfied. Furthermore, because the recent improvements to healthcare and the plans set forth throughout this submission provide a form of relief correcting alleged federal violations, the State Defendants do not seek the waiver of any State law under the PLRA (*see* 18 U.S.C. § 3626(a)(1)(B)(ii)-(iii)).

California Department of Corrections and Rehabilitation

Population Management Plan: Table 1

Fiscal Year		FY 08/09	FY 09/10	FY 10/11	FY 11/12	FY 12/13	FY 13/14	FY 14/15
Spring Population Projections[1]		167,965	172,232	172,295	174,003	175,177	177,317	178,915
Institution Population Reduction Measures								
	Probation Reform							
	Community Corrections		479	1,915	1,915	1,915	1,915	1,915
	Sentencing Reform							
	Enhanced Credit Earning		660	4,180	4,180	4,180	4,180	4,180
	Executive Authority							
	Expansion of Out Of-State Placements[2]		1,250	2,500	2,500	2,500	2,500	2,500
	Expanded Utilization of Private Prisons		400	800	800	800	800	800
	ICE Commutations		300	600	600	600	600	600
	Parole Reform							
	Summary Parole		966	4,556	4,556	4,556	4,556	4,556
	Discharge of Deported Parolees		279	271	271	271	271	271
	Alternative Parole Sanctions		119	897	1,000	1,000	1,000	1,000
	Parole Reentry Courts		50	435	435	435	435	435
	New Construction[3]							
	DJJ Renovations		700	1,300	2,700	2,700	3,900	3,900
	Reentry			500	500	3,000	5,500	8,000
	In-fill		64	64	764	6,850	6,850	6,850
Total Population Reduction			5,267	18,212	20,181	28,807	32,507	34,907
Institution Population[4]		150,655	149,635	132,416	132,292	123,822	120,388	117,346
Institution Crowding Rate		189%	188%	166%	166%	155%	151%	147%

The population in FY 08/09 is based on the actual population count on July 1, 2009. The projections in FY 09/10 and thereafter assume the transfer of any backlogged inmates into state custody.

[2] Assumes cooperation from Plata, Coleman, Perry, and Armstrong courts.

[3] The beds identified on this table reflect the actual capacity for which they are being built. The double celling rate of these facilities vary by project. However, whatever the double celling rate, the beds or projects are being designed with an appropriate amount of program and clinical space to accommodate that number of inmates.

[4] Excludes inmates in camps, private facilities and out-of-state facilities.

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A. ADDITIONAL CALIFORNIA OUT-OF-STATE CORRECTIONAL FACILITY EXPANSION

In addition to the 2,500 bed expansion set forth above, State Defendants will work with the Legislature to remove the existing clause that calls for the termination of the COCF program in 2011. With this legislative change, State Defendants estimate they will be able to expand the COCF program by an additional 5,000 inmates reducing its ADP by that amount.

B. PROPERTY CRIME THRESHOLDS

Numerous property crimes in California are punishable alternatively as a misdemeanor or a felony, depending on the dollar amount of the taking. For example, grand theft is punishable as a felony when the amount stolen exceeds $400, but is punishable as a misdemeanor when the amount stolen is $400 or less. In most cases, the threshold for these wobblers (crimes that may be prosecuted as either misdemeanors or felonies) was established over 20 years ago. As time has passed and inflation risen, increasing numbers of these wobblers have become prosecutable as felonies, thereby resulting in greater numbers of offenders eligible for prison sentences rather than jail sentences.

For thirty-nine of these property crimes, SB 18 increased the dollar threshold to present-day values. For example, property crimes where the threshold was set at $400 were increased to $950. The aim was to expose lesser number of offenders to felony prosecution and prison terms and thereby reduce the prison population. However, Senate Bill 18 left the threshold for grand theft itself unchanged, an omission that does not capture the impact of that offense,

and also undermines the effect of having changed many other property crimes because they could alternatively be charged as grand theft. The State Defendants seek legislation to increase the threshold of grand theft to $950. If fully implemented, Defendants estimate this program will net an approximately 2,700 reduction in CDCR's ADP.

C. ALTERNATIVE CUSTODY PROGRAM

The Administration will seek legislation to establish a program of alternative custody options for lower-risk offenders. Certain offenders would be eligible to serve the last 12 months of their sentence under house arrest with GPS monitoring. House arrest may include placement in a residence, local program, hospital, or treatment center. Eligible inmates include inmates with 12 months or less remaining to serve, elderly inmates, and medically infirm inmates. Inmates are ineligible for alternative custody if they have a current or prior conviction for a violent offense, are required to register as a sex offender, have a history of escape, or pose a high risk to reoffend pursuant to the California Static Risk Assessment. If fully implemented, Defendants estimate this program will net an approximately 4,800 reduction in CDCR's ADP.

D. SENTENCING COMMISSION

The Administration will seek legislation creating a permanent, independent sentencing commission that would set sentencing guidelines each year. The guidelines would later go into effect unless rejected by the Legislature and the Governor. The Commission would be a regulatory and research body housed within the Administrative Office of the Courts that would review the entire California Code in light of

empirical statewide sentencing data, recidivism rates, risk assessments, and population projections, to accurately forecast public safety impacts and correctional costs for all sentencing proposals. The commission would create coherent and equitable sentence guidelines that rest explicitly on the goal of coordinating sentences with available correctional resources. Many states have sentencing commissions and most experts recommend establishment of sentencing commissions.

Under the Administration's proposal, a sentencing commission would consist of thirteen voting members, subject to staggered 3-year terms, including a balance of law enforcement officials, judges, researchers, and defense lawyers. The Commission would present the Legislature and the Governor with a set of sentencing and parole rules, along with recommended statutory changes, by 2013. The Commission would thereafter publish reports on its sentencing research. In the event any court orders a reduction in inmate population, the Commission would develop recommendations for court compliance.

E. AB 900 CONSTRUCTION ACCELERATION

CDCR has collaborated with the *Plata* Receiver in his part as construction coordinator to develop CDCR's plan for healthcare beds, and has drafted legislation to enable CDCR to accelerate all of its construction authorized under AB 900 using alternative delivery methods. If the Legislature authorizes these amendments, CDCR would be able to expedite the construction of new capacity, including new healthcare facilities, and the construction of treatment and other support spaces to meet the needs of the class members.

Population Management Plan: Table II

Fiscal Year	FY 08/09	FY 09/10	FY 10/11	FY 11/12	FY 12/13	FY 13/14	FY 14/15
Spring Population Projections[1]	167,985	172,232	172,285	174,003	175,177	177,317	178,915
Institution Population Reduction Measures							
Probation Reform							
Community Corrections	479	1,915	1,915	1,915	1,915	1,915	1,915
Sentencing Reform							
Enhanced Credit Earning	660	4,180	4,180	4,180	4,180	4,180	4,180
Property Crime Thresholds		2,700	2,700	2,700	2,700	2,700	2,700
Alternative Custody		2,400	4,800	4,800	4,800	4,800	4,800
Executive Authority							
Expansion of Out-Of-State Placements[2]	1,250	2,200	7,500	7,500	7,500	7,500	7,500
Expanded Utilization of Private Prisons	400	800	800	800	800	800	800
ICE Commutations	300	600	600	600	600	600	600
Parole Reform							
Summary Parole	966	4,556	4,556	4,556	4,556	4,556	4,556
Discharge of Deported Parolees	229	271	271	271	271	271	271
Alternative Parole Sanctions	119	851	1,000	1,000	1,000	1,000	1,000
Parole Reentry Courts	50	435	435	435	435	435	435
New Construction[3]							
DJJ Renovations	700	1,800	2,700	2,700	3,800	3,800	3,800
Reentry		500	500	3,000	5,500	8,000	8,000
Infill	64	64	704	6,850	6,850	6,850	6,850
Total Population Reduction	5,267	23,312	32,661	41,307	44,907	47,407	
Institution Population[4]	150,455	149,535	137,376	119,770	110,522	107,830	104,846
Institution Crowding Rate	185%	183%	169%	151%	139%	136%	132%

[1] The population in FY 08/09 is based on the actual population count on July 1, 2009. The projections in FY 09/10 and thereafter assume the transfer of any backlogged inmates into state custody

[2] Assumes cooperation from *Plata*, *Coleman*, *Perez*, and *Armstrong* courts

[3] The beds identified on this table reflect the actual capacity for which they are being built. The double celling rate of these facilities vary by project. However, whatever the double celling rate, the beds or projects are being designed with an appropriate amount of program and clinical space to accommodate that number of inmates

[4] Excludes inmates in camps, private facilities and out-of-state facilities

IV.

CONCLUSION

As required by the August 4, 2009 order, but without waiving its appellate rights, the State Defendants submit this Plan to reduce the State's prison population through smart reforms that do not compromise public safety.

EXHIBIT B

California Department of Corrections and Rehabilitation Achievements & Improvements Introduced During Three-Judge Court Proceeding

During the course of the Three-Judge Court proceeding, Defendants introduced the following evidence detailing the California Department of Corrections and Rehabilitation's (CDCR) achievements and improvements. Those include:

I. Improvements in the Delivery of Medical Care

A. Funding:

1. In FY 1994-95, $344 million was expended for inmate health care or $2,714 per inmate per year (in 1994 dollars). (Trial Aff. of Todd Jerue, 10/30/08, (Jerue Aff.) *Plata v. Schwarzenegger* Dock. No. 1632 at ¶ 6.).

2. In FY 2005-06, $1.252 billion was expended for inmate health care or $7,601 per inmate per year (in 2005 dollars). (*Id.* at ¶ 7.)

3. In FY 2006-07, $1.635 billion was expended for inmate health care or $9,759 per inmate per year (in 2006 dollars). (*Id.* at ¶ 8; Trial Transcript (Trial Tr.), 12/3/08, at 1210:4-13; 1213:17-22; 1215:20-1216:20.)

4. In FY 2007-08, $2.249 billion was expended for inmate health care or $13,778 per inmate per year (in 2007 dollars). (*Id.* at ¶ 9.)

B. Improvements in Death Review and Death Review Programs:

1. The number of alleged preventable asthma deaths went from 6 in 2006 to 0 in 2007. (Trial Tr., 11/20/08, at 450:20-451:2.)

2. The number of alleged preventable deaths went from 18 in 2006 to 3 in 2007. (*Id.* at 486:16-22; 487:2-5; 12/10/07 Deposition of Ronald Shansky (Shansky Dep.) at 74:7-16.)

3. Deaths have trended down in the last 10 quarters. (Trial Tr., 11/20/08, at 454:21-455:12.)

C. Staffing Increases:

1. Physicians: CDCR's physician staffing has increased dramatically, and is within 5% of the Receiver's goal to fill 90% of physician positions. (Trial Tr., 11/20/08, at 445:7-446:14; 447:9-448:5.) Between November 2007 and August 2008, CDCR hired 62 full-time state employed primary care physicians. (Defendants' Trial Exhibit (Defs.' Tr. Ex.) 1235—Staffing Progress for Medical and Mental Health at 3.)

2. Chief Physicians and Surgeons: Between October 2005 and August 2008, the number of full-time state employed Chief Physicians and Surgeons rose from 10 to 28. (*Id.* at 2.)

3. Physician Assistants: The number of Physician Assistants rose from 1 in April 2006 to 13 in August 2008. (*Id.* at 4.)

4. Nurse Practitioners: The number of Nurse Practitioners rose from 11 in October 2005 to 44 in August 2008. (*Id.* at 5.)

5. Registered Nurses: The number of registered nurses rose from 818 in October 2005 to 1556 in August 2008. Staffing of registered nurses has increased and is now within 2% of the Receiver's statewide goal

to fill 90% of nursing positions. (Trial Tr., 11/20/08, at 445:7-446:14; 447:9-448:5.)

6. Licensed Vocational Nurses: The number of licensed vocational nurses rose from 4 in May 2007 to 937 in August 2008. (Defs.' Tr. Ex. 1235 at 7.)

7. Correctional Officers: The number of correctional officers employed by the department rose from 20,741 in October 2005 to more than 24,090 in August 2008. (*Id.* at 8.)

D. During the *Plata v. Schwarzenegger* Receivership, other improvements include:

1. New screening and assessment processes at reception and release;

2. New health care access units—that include large numbers of correctional officers charged with ensuring inmate access to medical care;

3. Establishing new and better health care scheduling and patient-inmate tracking systems;

4. Redesigning and improving sick call processes, forms, and staffing models;

5. Improved chronic care systems;

6. Improved emergency response plans and systems;

7. Improved provision of and access to specialty care and hospital services;

8. Improved medical clinical leadership and management;

9. Improved peer review and death review programs;

10. Establishment of a comprehensive, safe, and efficient pharmacy program—including continued development of the drug formulary and the rollout of a computerized pharmacy operating system designed to improve medication management in CDCR institutions.

11. Establishing standardized health records practices—ultimately leading to the use of electronic medical records; and

12. Establishing effective radiology and laboratory services.

(Defs.' Tr. Ex. 1100—Receiver's Ninth Quarterly Report, 09/15/08, *Plata* Dock. No. 1472 at 8-12, 15-24, 33-34, 40-41, 51-58.)

II. Improvements in the Mental Health Care Delivery System

A. Enhanced Screening, Diagnosis, and Treatment Procedures

1. Since 1997, Defendants have used a uniform set of policies and procedures to provide care to mentally ill inmates. (Trial Aff. of Robin Dezember, 10/30/08, (Dezember Aff.) *Plata v. Schwarzenegger* Dock. No. 1715 at ¶ 15.)

2. CDCR now identifies and classifies a significantly greater proportion of its inmates as belonging to the *Coleman* class than it did when the *Coleman* litigation began. In August 2008, CDCR classified 20% of its inmates as severely mentally ill, up from 7.9% in 1994. (*Id.* at ¶¶ 70, 71.)

3. The treatment programs or 'levels of care' provided by Defendants have increased in size and in specificity. Under the Revised Program Guide, Defendants now provide distinct levels of care and programs reflecting the mental health care and housing needs of *Coleman* class members. (Defs'. Trial Ex. 1273—*Coleman* F&Rs, 6/6/94 at 43-44; *see also* Dezember Aff., ¶ 70.)

B. Mental Health Bed Increases

1. In 1994, the CDCR mental health care system was limited to a few institutions and involved some 3,200 designated mental health care beds. (Defs.' Trial Ex. 1273—*Coleman* F&Rs, 6/6/94, at 43-44; Dezember Aff., ¶ 70.) Now, the CDCR mental health care system extends to each CDCR institution across the State and involves some 30,382 beds across all levels of care. (Dezember Aff., ¶ 75; Defs.' Trial Ex. 1247—Chart of CDCR Facilities.)

2. There are now three state mental hospitals and two psychiatric programs available for inpatient care. (Trial Tr., 11/21/08, at 758:13-22; 759:9-760:5.) These facilities include Atascadero, Coalinga, and Patton State Hospitals and psychiatric programs at CDCR's California Medical Facility and Salinas Valley State Prison institutions. (Trial. Aff. of Cynthia Radavsky, 10/30/08 (Radavsky Aff.) *Plata v. Schwarzenegger* Dock. No. 1657 at ¶ 14; Trial Tr., 11/21/08, at 758:13-22, 759:9-760:5.)

3. Defendants have systematically added mental health beds at individual institu-

tions, with a resulting decrease in wait lists for mental health beds. For instance, the activation of 64 Psychiatric Services Unit beds in 2008 resulted in a decrease in the waiting list from 79 to 22. Likewise, the activation of 50 Mental Health Crisis beds in 2008 contributed to a decrease in the waiting list for such beds from 301 to 16. Kern Valley State Prison recently added 96 sensitive need Enhanced Outpatient Program (EOP) beds, which allowed EOP patients to be moved from administrative segregation to those beds. (Dezember Aff., ¶ 74; Defs.' Trial Ex. 1186—Kern Valley State Prison Activation Mem., Aug. 2008.)

C. Mental Health Staffing Increases

1. CDCR has increased its number of mental health clinicians, including psychiatrists, psychologists, and social workers, from 314 positions in 1994 to 2396 positions in 2008. (Dezember Aff. ¶ 48; *see* Defs.' Ex. 1269—Chart of 1994 Mental Health Care Positions; Defs.' Trial Ex. 1235—CDCR 2008 Mental Health Care Positions; Defs.' Trial Ex. 1246, CDCR Chart of Mental Health Positions.)

2. Both CDCR and the Department of Mental Health (DMH) have used new pay parity packages to drive stronger recruiting strategies for mental health clinical staff (Dezember Aff., ¶¶ 57, 58; Radavsky Aff., ¶ 28; Trial Tr., 11/21/08 at 812:11-813:13.)

3. CDCR now employs approximately 2400 correctional officers in dedicated "access to care" units to provide escort for inmates to

their medical and mental health appointments. (Trial Tr., 12/10/08, at 1894:20-1895:6.)

D. Suicide Prevention Program Improvements

1. At the underlying trial, the *Coleman* court found that Defendants' 1990 suicide prevention program for CDCR institutions would have been sufficient if adequately staffed. (Dezember Aff. ¶ 30; Defs.' Trial Ex. 1273—*Coleman* F & R, 6/6/94, *Coleman* Dock. No. 547 at 75:1-6.) Defendants have significantly increased mental health staffing since the underlying trial. (Dezember Aff., ¶ 48; *see* Defs.' Trial Ex. 1269—Chart of 1994 Mental Health Care Positions; Defs.' Trial Ex. 1235.)

2. The *Coleman* court found in 2005 that suicides occurred at higher rates within administrative segregation areas. CDCR worked with the *Coleman* Special Master and Plaintiffs' counsel to develop improved suicide prevention strategies for administrative segregation areas. The *Coleman* court approved and Defendants have implemented a multidisciplinary and comprehensive approach to reducing suicides. (Dezember Aff., ¶¶ 32-41; *see* Defs.' Trial Ex. 1279—*Coleman* Order, 6/9/05, *Coleman* Dock. No. 1668; Defs.' Trial Ex. 1280—*Coleman* Stipulated Order, 2/13/06, *Coleman* Dock. No. 1760; Defs.' Trial Ex. 1282—*Coleman* Order, 6/8/06, *Coleman* Dock. No. 1830; Defs.' Trial Ex. 1311—*Coleman* Stipulated Order, 7/5/06, *Coleman* Dock. No. 1872.)

3. The performance and efficacy of these suicide prevention programs is measured by CDCR's internal investigations and analyses of any inmate suicides within its institutions. (Dezember Aff. ¶¶ 35-36.)

E. Mental Health Records System—Defendants are continuing to work to improve CDCR's mental health recordkeeping systems. According to current estimates, new information technology will be implemented within 18-24 months. (Dezember Aff. ¶¶ 90-91.)

F. Pharmacy System—The Coordinated Courts vested the *Plata* Receiver with leadership responsibility over the pharmacy function of the medical and mental health services delivery system. (Defs.' Trial Ex. 1299, Coordinated Cts' Order, 6/28/07.) The *Plata* Receiver has contracted with Maxor National Pharmacy Services Corporation to install the necessary pharmacy services in each institution. (*Id.*)

III. CDCR Inmate Mortality Rates

A. CDCR had the 14th best mortality rate nationally. (Trial Tr., 11/19/08, at 244:7-27.)

B. From 2001 to 2004, the average annual mortality rate for all illnesses per 100,000 state prisoners was 223 nationwide, 181 for States in the west region, and 170 for California. Thirty-six states had higher mortality rates than California during this period. (Trial Tr., 12/3/08, at 1271:9-1272:21.)

IV. Relevant California Criminal Justice Statistics

A. California does not incarcerate felons at an unusually high rate. Currently, California sends fewer than 20% of convicted felons to prison—the national average is 40%. (Trial Aff. of Mathew Cate, 10/30/08, (Cate Aff.,), *Plata* Dock. No. 1717 at ¶¶ 23-24.) California's incarceration rate—the number of prison inmates per state residents—is only slightly above the national average. California's incarceration rate is about 470 per 100,000. The national average is 445 per 100,000. (Cate Aff. ¶ 22, Defs.' Tr. Ex. 1257—Prisoners in 2006 Bulletin, Appendix Table No. 6.)

B. California does not keep people in prison longer than average. The average prison sentence imposed in California is 47.2 months and the average amount of time served is 23.9 months. (Cate Aff. ¶ 25.) The average prison sentence imposed nationwide for all state courts is 57 months and the average amount of time served is 32 months. (*Id.*; Defs.' Trial Ex. 1221—State Court Sentencing of Convicted Felons 2004—Statistical Tables.)

C. The increase in the prison population from 1997 to 2007 is almost exclusively made up of an increase in the number of inmates convicted of crimes against persons. (Cate Aff. ¶ 18.) There has been a decrease in the number of drug offenders in California's prisons in the same 10 year period—from 41,459 to 33,738. (Cate Aff. ¶ 18.)

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
AND THE NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES DISTRICT COURT COMPOSED
OF THREE JUDGES PURSUANT TO
SECTION 2284, TITLE 28 UNITED STATES CODE

[Filed 09/03/2009]

No. 2:90-cv-00520 LKK JFM P
THREE-JUDGE COURT

RALPH COLEMAN, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

No. C01-1351 TEH
THREE-JUDGE COURT

MARCIANO PLATA, *et al.*,
Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, *et al.*,
Defendants.

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

To: Three-Judge Panel

Notice is hereby given that Defendants Arnold Schwarzenegger, John Chiang, Michael C. Genest, Matthew Cate, and Stephen W. Mayberg appeal to the Supreme Court of the United States from the August 4, 2009 Order of the Three-Judge Court. This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED: September 3, 2009

HANSON BRIDGETT LLP

By: /s/ Paul B. Mello
PAUL B. MELLO
(Cal. Bar No. 179755)
425 Market Street, 26th Floor
San Francisco, CA 94105
Telephone: (415) 777-3200
Facsimile: (415) 541-9366
Attorneys for Defendants
Arnold Schwarzenegger, et al.

DATED: September 3, 2009

EDMUND G. BROWN JR.
Attorney General of the
State of California

By: /s/ Kyle Lewis
KYLE LEWIS
(Cal. Bar. No. 201041)
Deputy Attorney General
455 Golden Gate Avenue,
Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5724
Facsimile: (415) 703-5843
Attorneys for Defendants
Arnold Schwarzenegger, et al.

APPENDIX H

FEDERAL STATUTE

18 U.S.C. § 3626: Appropriate remedies with respect to prison conditions

(a) Requirements for Relief.—

(1) Prospective relief.—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless—

(i) Federal law requires such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or

the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

* * * *

(3) Prisoner release order.—(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless—

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that—

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

* * * *

(g) Definitions.—As used in this section—

* * * *

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

* * * *

(3) (2)

Nos. 09-416, 09-553

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

CALIFORNIA STATE REPUBLICAN LEGISLATOR INTERVENORS, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

Appeal from the United States District Courts for the Eastern District of California and the Northern District of California

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APPELLEE INTERVENOR CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION'S MOTION TO DISMISS OR AFFIRM

DANIEL M. LINDSAY
DAVID A. SANDERS
CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION
755 Riverpoint Drive
Suite 200
West Sacramento, CA 95605
(916) 372-6060

LAURIE J. HEPLER
Counsel of Record
GREGG MCLEAN ADAM
GONZALO C. MARTINEZ
NATALIE LEONARD
CARROLL, BURDICK & MCDONOUGH LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900

Attorneys for Appellee Intervenor

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QUESTIONS PRESENTED

Appellants and Appellant-Intervenors mischaracterize the issues on appeal. California Correctional Peace Officers' Association ("CCPOA") submits that the actual questions raised by Appellants' and Intervenors' Jurisdictional Statements are as follows, and that the answers to all of them are "no":

1. Was it improper to convene a three-judge district court to consider a "prisoner release order" under the PLRA to address uncontested, ongoing constitutional violations in California prisons when the State made recent and limited efforts that did not resolve the underlying cause of the constitutional violations, *i.e.*, overcrowding?

2. Did the three-judge district court clearly err in its factual finding that overcrowding is the "primary cause" of unconstitutional conditions in California state prisons?

3. May this Court properly review, for compliance with the PLRA's "nexus" and "narrow tailoring" requirements, an Opinion and Order that merely requires the State to propose a "Population Reduction Plan"?

CORPORATE DISCLOSURE

CCPOA is a non-profit corporation organized under the laws of the State of California. As such, it has no parent and there is no publicly-held company owning 10% or more of its stock.

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APPELLEE INTERVENOR CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION'S MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, Appellee Intervenor California Correctional Peace Officers' Association ("CCPOA") moves to dismiss the Jurisdictional Statements filed by Appellants and Appellant-Intervenors or, in the alternative, to affirm the judgment sought to be

reviewed, on the ground that the questions on which they depend are so unsubstantial as not to warrant further review.

JURISDICTION

This Court does not have jurisdiction under 28 U.S.C. § 1253 to review the three-judge district court's Opinion and Order because it is not a final order. The lower court has merely ordered Appellants to file a "population reduction plan" for California prisons. State App. 255-256a. The lower court has not issued its final decree.

STATEMENT OF THE CASE[1]

The essence of Appellants' and Intervenors' appeals is that it is beyond the province of a federal court to tell the State to create its own solution to a conceded constitutional violation. The PLRA does not support so radical a proposition. *See* 18 U.S.C. § 3626.

Appellee Intervenor CCPOA represents the men and women who work in California state prisons: approximately 35,000 correctional officers, counselors, parole agents, medical technical assistants, and correctional sergeants and lieutenants. As peace officers, CCPOA members share the concern for public safety that compelled Congress to pass the PLRA. CCPOA intervened in this case because the extreme overcrowding in California prisons has not only caused Eighth Amendment violations, but also endangered prison staff and made it impossible for staff to fulfill their duties.

Correctional staff are the only Intervenors who daily confront these sobering realities. In granting

---

[1] Appellee Intervenor CCPOA also joins in the Statement of the Case presented by Appellees.

CCPOA's motion to intervene, the district court found: "It is plain that California's prison guards are affected by the conditions of the prisons in which they work," and that CCPOA was "uniquely situated" to provide evidence regarding prison conditions. *Coleman* Docket No. 2427.

Appellants and their Intervenors overstate the differences between the State and the district court. Although various counsel for Appellants argued in the three-judge proceeding that the constitutional violations had been remedied, the State did not actually show how it remedied the Eighth Amendment violations. Nor did it ever seek to lift the special master appointment or the receivership, respectively, on the basis that the State had remedied the constitutional violations. State App. 77a. Moreover, the State never appealed the finding of unconstitutional violations in *Coleman*, and stipulated to liability in *Plata*. *See* State App. 15-16a, 31-32a. In fact, as Appellees note, the State concedes in *Plata* that the constitutional violations continue. *See* Appellee Motion to Dismiss or Affirm Appeal of State Defendants ("Appellee Mot."), at p. 10.

Indeed, the Governor himself proclaimed over three years ago, in declaring a State of Emergency under California law, that continuous and severe overcrowding in California prisons had created increasingly unsafe conditions for inmates and workers. Appellee App. 1-2a; State App. 61-62a. His Emergency Proclamation remains in effect. *See* State App. 62a. It details grave statistics evidencing that California prisons are "at or above maximum operational capacity," causing "conditions that pose substantial safety risks," including "an increased substantial risk of violence, and greater difficulty in controlling

inmate populations" and "substantial risk for transmission of infectious illnesses." Appellee App. 1-10a. The Governor concluded that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding . . ." *Id.* at 12a.

The *Plata* and *Coleman* lawsuits sought to redress conditions closely related to what the Governor described: the prison system's failure to provide constitutionally adequate medical and mental health care. Appellees moved to convene a three-judge district court to consider a "prisoner release order" only after years of escalating orders from the two district courts failed to cure the Eighth Amendment violations because of severe overcrowding. The *Plata* and *Coleman* courts held individual and joint hearings on the matter before they convened the panel. State App. 273-274a, 289a.

The three-judge court found that correctional staff were "essential to providing healthcare to prisoners." State App. 110a, quotation and citation omitted. Among other roles, correctional officers escort prisoners to medical services within an institution, and they supervise prisoners transported elsewhere for treatment. *Ibid.* Perhaps more importantly, correctional staff are responsible for alerting medical staff when prisoners complain of acute medical issues, and are charged with observing prisoners to identify health or mental problems. *Ibid.*

But as correctional officers testified at trial, overcrowding makes it difficult to perform their roles properly—or in many instances, at all:

- Officer Brenda Gibbons testified that she observed mentally-ill prisoners being held in converted supply closets for lack of available suicide-watch beds. Trial Tr. 558-560, 575-

576. Although state prison regulations limit the time spent in such holding cells to four hours, officers are ordered to cycle inmates from those cells to another room and then back due to the lack of available beds, resulting in overnight stays. *Id.* at 575.

- Due to lack of interior space, half of the mental health programs that Officer Gibbons observes take place in the prison yards, requiring those programs to be cancelled whenever weather is poor or officers must leave to deal with emergencies. *Id.* at 566, 577.

- Inmates wait hours for medical care in chaotic and unsafe conditions. Officer Gary Benson testified that up to fifty inmates routinely wait in a fenced holding area for two to five hours, to see a doctor in a 20-foot by 35-foot "clinic." Doctors examine four to six inmates in the same tiny room, surrounded by unlocked boxes of needles, scissors, and narcotics. Officer Benson is the only officer present. Trial Tr. 592-599.

- Debra Rowlett is a correctional officer and a licensed nurse. Trial Tr. 657, 659-660. She testified that she witnessed inmates standing in lines 300 people deep to obtain their prescribed psychotropic medications. Officer Rowlett testified that inmates sometimes receive the wrong medication. Correctional staff and nurses have no time to double-check prescriptions, ask about adverse effects, or ensure that inmates consume their medication—all essential for proper medical care. Unsupervised prisoners may have their medication stolen by other inmates, or hoard it, rather

than consuming it. Officer Rowlett testified that at least one prisoner died after purposely overdosing on hoarded medication. *Id.* at 665-667.

- Correctional Sergeant Kevin Raymond works on a team responsible for prison construction and operations planning. Trial Tr. 535-536. He testified that the majority of California prisons were designed with sufficient medical space to treat a population of only one inmate per cell, yet CDCR planned to house two inmates per cell. *Id.* at 542-543. Thus almost all California prisons have less than half the space necessary to provide adequate medical care at current population levels. (But even if there were sufficient space, correctional officers testified that there are insufficient correctional officers to transport inmates to appointments or to monitor them. Trial Tr. 679, 692; *see also* State App. 110a.)

These officers' testimony made plain that adequate correctional-staff-to-inmate ratios are essential for delivery of constitutionally adequate medical and mental health services to California prisoners. The three-judge district court, however, found that "[t]he California prison system lacks sufficient custodial staff . . . to provide prisoners with timely access to [medical] care and still perform other essential [penological] functions." State App. 110a, quotation and citations omitted. The evidence established that understaffing undermines health care services, placing prisoners at substantially increased risk of further deterioration. State App. 111-112a. Despite their best efforts, overworked correctional staff are not able to respond to medical emergencies because of

"forced overtime and burnout" (State App. 111a, quotations and citations omitted), and because it is unsafe to leave hundreds of prisoners supervised by only one officer so that his or her partner can take a sick inmate to receive medical care. *Id.* at 110-111a.

Based on this and other evidence, presented over a multi-week trial, the three-judge district court concluded that overcrowding was the primary cause of the unconstitutional violations in California prisons. State App. 140-143a. After determining that no other relief would remedy the constitutional violations (*id.* at 168a), that it was the least intrusive remedy (*id.* at 168-175a), and that public safety would not be adversely affected (*id.* at 220-234a), the three-judge court ordered the State to *propose a plan* to reduce the prisoner population to 137.5% of design capacity within two years. *Id.* at 255-256a. It did not order any specific relief—much less any prisoner release—but instead allowed the State to design its own plan in the first instance. *Id.* The court outlined numerous options available to the State to comply with its order (*id.* at 192-220a), many of which the Governor himself recently proposed to the Legislature for independent budgetary reasons, including a prisoner reduction of 37,000 over two years. *See Plata* Docket No. 2269.

The State's first submitted plan did not comply with the most basic parameters of the court's order. *Plata* Docket No. 2269. Accordingly, the court rejected the State's plan on October 21, 2009, requested more information regarding the Governor's proposed plans to the Legislature, and gave the State even more time to submit a plan that did comply. *Ibid.* On November 12, the state filed its second proposed population plan. *Plata* Docket No. 2274.

Appellants' and Appellant-Intervenors' Statements of the Case

Appellants and their supporting Intervenors take substantial liberties with the record.

First, as explained above and as Appellees demonstrate in their Motion, the unconstitutional conditions are established and conceded by Appellants—not merely "alleged" (State J.S. 2; State App. 77a) and certainly not before this Court for review. The three-judge court admitted all evidence of current conditions; the State identifies no evidence that was offered but not admitted, and never made an offer of proof as to any such evidence. *See* Appellee Mot. 20-23. The three-judge court did not re-determine whether there was a continuing constitutional violation because it was neither authorized nor requested to do so. No such request came from Appellants or their Intervenors (State App. 77a), and in all events, the three-judge district court was convened under the PLRA only for the purpose of considering a "prisoner release order." *See* 18 U.S.C. § 3626(a)(3)(B).

Appellant-Intervenors in particular argue that the three-judge court should not have issued the Opinion and Order without renewed proof that the violations were ongoing. Intervenors' J.S. 8-9. Their position would result in a never-ending loop: a remedial phase lengthy enough to assure a three-judge court that no relief other than a population limit can alleviate the constitutional violations would always result in the original findings becoming "stale." The three-judge court would thus always be required to revisit the findings of unconstitutional conditions—which it has no authority to do under the PLRA (*see* 18 U.S.C. § 3626(a)(3)(A), (B))—and no relief would ever be

possible. An interpretation of the PLRA that effectively nullifies it must be rejected.

The proper forum for Appellant-Intervenors to challenge the finding of constitutional violations is before the single-judge district courts with a motion to terminate the respective actions. If those courts were to find that the constitutional violations were remedied, under the PLRA, the three-judge court's order can be modified or terminated. *See* 18 U.S.C. § 3626(b)(1), (4). Appellant-Intervenors never so moved.

Second, Appellants gloss over their non-compliance with orders issued over many years by the *Plata* and *Coleman* courts, emphasizing only the most recent orders and Appellants' attempts at compliance. State J.S. 6-9. In particular, the appointment of a Receiver in *Plata* was hardly the beginning of the story, but instead an extraordinary measure born of that court's lengthy struggle against Appellants' failures and recalcitrance. State App. 21-30a, 281a (Receivership was culminating order at the end of series of less intrusive orders that brought no meaningful change).

The State also maintains that it had no opportunity to implement Assembly Bill 900, which would have alleviated the violations. But the *Plata* and *Coleman* courts both considered the potential impact of that bill, and determined that it could proceed simultaneously with the three-judge panel's consideration of a prisoner release order, particularly since Assembly Bill 900 would take years to implement and did not sufficiently address overcrowding or understaffing. *See* State App. 283-284a (*Plata*), 299-304a (*Coleman* court: "AB 900 simply fails to address in any timely way relief from the overcrowding crisis"), 146-147a (Three-Judge Court: noting that "not a single [re-entry] facility had been constructed

under AB 900" and that "California has no plans to construct additional prisons in the near future and has not suggested that it does").

The State disputes the court's finding that overcrowding was the principal cause of the constitutional violations because there were "other causes." State J.S. 9. But the court correctly recognized that the common font of these problems was overcrowding.

Appellants claim that the Opinion and Order would cause a "statistically significant increase in crime" (State J.S. 10), but the Order only requires the State to create a plan, leaving it to the State to ameliorate the impact on public safety in the manner it sees fit given California's priorities. (State App. 174a) The only option *not* open to California is to continue its longstanding contempt for the Eighth Amendment to the United States Constitution.

Appellants also fault the court for using the 137.5% figure as the cap for California prisons but nowhere explain what is actually inappropriate about that number. State J.S. 10. Moreover, the court's order is not overbroad because it need not reach members outside the *Plata* and *Coleman* classes (*Ibid.*), since there is no "prisoner population cap" yet in place and the State may in its discretion choose to exclude non-class members. Regardless, given that the court found that a systemic approach was necessary to remedy the widespread impact of the constitutional violations and prison conditions, this is unlikely.

To the extent no order like the August 4 Order has been previously "imposed" on a State (State J.S. 2), it is because no other State has similarly refused to remedy Eighth Amendment violations when repeatedly ordered to do so. But even here, California's

resistance to compliance with the Constitution did not provoke intemperate judicial meddling, as Appellants and their Intervenors suggest. On the contrary, the three-judge court acted with great care and caution, conscious of the limitations imposed by federalism and the dignity of the State, but ultimately cognizant of their role in protecting federal rights. *See* State App. 254a ("Federal courts do not intervene in state affairs lightly. Principles of federalism, comity, and separation of powers require federal courts to refrain from addressing matters of state government in all but the most pressing of circumstances."); 156a (rejecting reliance on *Plata* Receiver as alternative remedy because "scope of intrusion by the Federal Court" would inevitably increase); 171-174a (imposing system-wide population cap because institution-specific caps intrude on "state's management of its prisons").

After closing argument at trial, the panel beseeched the State to remedy the violations on its own:

> I hope that the next time we are together it will be so that you can tell us that California's leaders have not only recognized the seriousness of the crisis, but have finally agreed to take the necessary steps to resolve it . . . [¶] If not, it will be for us, perhaps after further exploration of some of the possible remedies, to tell you how it will be resolved. [¶] I cannot possibly convey to you the depth of our reluctance to do it that way, but if you leave us no alternative, we will.

Trial Tr. 3145. Appellants indeed left the court no alternative, continuing a pattern of many years' duration.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The issues raised in the Jurisdictional Statements are primarily factual disputes that are insufficiently substantial to merit plenary review. The three-judge district court's population cap order creates no conflict within the federal judiciary over the meaning of the PLRA or its application. Finally, the decision has limited precedential value because these facts are unique; they have not been and are unlikely to be repeated in other jurisdictions.

The three-judge court's findings are factual in nature and thus limited to the circumstances of this case. *See* State App. 274a and 290a (*Plata* and *Coleman* courts defining question before them as whether prior orders issued and "reasonable" time given for compliance); *id.* at 73-74a (three-judge court: is there "clear and convincing evidence" that overcrowding is the primary cause of constitutional violations); *id.* at 75-76a (narrow tailoring and public safety). As such this case does not present issues demanding nationwide uniformity. All issues that Appellants and Intervenors present for review are really challenges to the lower courts' factual determinations. This Court should decline their invitation to sift through the evidentiary record.

Nor, as explained above, does this case implicate the federalism concerns raised by Appellants or Intervenors. In the lower courts, the State was given every opportunity to comply with court orders to address undisputed violations of the Eighth Amendment, and to propose specific relief—substantial deference to a recalcitrant party, given the gravity of the violations established. The Eighth Amendment (among others) says what a state may not do under

any circumstances (*see Robinson v. California*, 370 U.S. 660 (1962) (applying Eighth Amendment to the states)), yet California has been doing some of those things for so long, without serious progress toward remedy, that the three-judge court was authorized—indeed compelled—to act.

Further, the State cites no conflict in lower courts regarding the primary issues for review even as they frame them: (A) the standards for convening a three-judge panel, (B) the meaning of the PLRA's "primary cause" standard, or (C) the PLRA's "nexus" and "narrow tailoring" requirements. *See* State J.S. 11-13. Appellants and their Intervenors cite no cases demonstrating any conflict among the lower courts regarding the application of the PLRA.

Finally, even if the issues Appellants raise might otherwise merit review, this case is not the proper vehicle because of the State's almost two-decade-long failure to comply with over 70 court orders formulated to achieve compliance with the Constitution. State App. 38a. This is an exceptional factual scenario unlikely to be repeated.

ARGUMENT

CCPOA supports affirming the three-judge district court's actions below or, in the alternative, dismissing Appellants' and Intervenors' Jurisdictional Statements.

I. NO FINAL "PRISONER RELEASE ORDER" EXISTS, AND NO ORDER REQUIRING RELEASE OF PRISONERS MAY EVER ISSUE.

Despite its inapt name and Appellants' repeated implication, a "prisoner release order" under the PLRA does not require California to fling open its prison

gates. CCPOA cedes no ground to anyone in its concern for public safety, and would not support so indiscriminate an order. Rather, a "prisoner release order" is "any order . . . that has the purpose or effect of reducing or limiting the prison population . . . ." *See* 18 U.S.C. § 3626(g)(4).

The three-judge court ordered a population cap but did not order a release of prisoners. Instead, it directed the State to submit its own plan for achieving that cap within two years. State App. 255-256a. In developing its plan, the State could "choose among many different options or combinations of options for reducing the prison population." State App. 174a. These various options were recommended not only by Appellees' experts, but also by the State's own experts, "including the Governor, CDCR officials, and the CDCR Expert Panel." State App. 249a, 174a. Accordingly, the three-judge court included them on a non-exclusive list outlining how California could comply with the Order:

- Expansion of "good time" credits allowing prisoners to earn limited early release;
- Diverting technical parole violators from prisons;
- Diverting low-risk offenders with short sentences from prisons;
- Expansion of rehabilitation programs; or
- Sentencing reform.

State App. 196-219a, 248-253a. The State's initial effort at a population-reduction plan incorporated many of these alternatives to release (*see* State App. 319-327a, 340-342a), as does its most recent proposal, filed November 12, 2009 (*see Plata* Docket No. 2274-1).

There is no imminent threat of lawlessness. The overwhelming testimony at trial supported the district court's conclusion that such population reduction measures "either have no impact on or reduce the recidivism rate" and therefore "would not adversely affect public safety." State App. 249a.

II. THE THREE-JUDGE PANEL WAS PROPERLY CONVENED BECAUSE THE *PLATA* AND *COLEMAN* COURTS' PREVIOUS ORDERS DID NOT REMEDY THE CONSTITUTIONAL VIOLATIONS EVEN THOUGH APPELLANTS HAD AMPLE TIME TO COMPLY.

CCPOA supported Appellees' efforts to convene the three-judge court because the single-judge district courts had exhausted all other means to bring the California prison system into compliance with the Eighth Amendment. Throughout the long history of *Plata* (almost 8 years) and *Coleman* (18 years), not a single prison was ever in full compliance with those courts' orders, despite specific timelines, plans, and stipulations by Appellants. State App. 17a.

This was *more* than what the PLRA required, and indeed, the single-judge district courts proceeded with exceptional caution over many years. Contrary to the State's contention, there was no rush to convene this panel. CCPOA endeavors to provide this Court with necessary context that amply justified—both legally and practically—the convening of the three-judge district court.

1. The PLRA sets forth two requirements to convene a three-judge panel: (1) the single-judge court previously entered orders for less intrusive relief that failed to remedy the violation of the federal

right; and (2) Appellants had a reasonable amount of time to comply with those orders. *See* 18 U.S.C. § 3626 (a)(3)(A), (C). No Appellants cite any conflict among lower courts in interpreting or applying the PLRA at all, let alone regarding the propriety of convening a three-judge panel. The fact is that not many courts have found need to construe these provisions, and courts that have done so, including the three-judge panel here, have had no difficulty. *See, e.g., Roberts v. County of Mahoning*, 495 F.Supp.2d 694 (N.D. Ohio 2006). There is simply no call for this Court to step in to address this issue; rather it should first allow the lower courts to develop a body of law addressing it.

Moreover, the factual determination whether the PLRA's statutory predicates are satisfied is not an issue of "jurisdiction," for the reasons outlined in Appellees' Motion. Appellee Mot. 28-36. The single-judge courts were well-positioned to make that factual determination, and they did so correctly based on the lengthy records.

2. The State failed for years to implement the *Plata* and *Coleman* courts' orders.

In *Plata*, Appellants conceded that prison conditions were unconstitutional and judicial oversight necessary under the PLRA. State App. 15-16a; *Plata* Docket No. 68, ¶29 (June 13, 2002 Stipulation and Order for Injunctive Relief, stipulating that all requirements of PLRA satisfied). Appellants utterly failed to implement meaningful reform and did not meet any of the court-imposed deadlines or timelines upon which they had agreed. State App. 17a.

The *Plata* court tried everything within reason to bring the State into compliance:

- Entered multiple orders, including reiterations of prior orders, with which the State did not comply. State App. 17-20a.
- Appointed prison experts to review conditions and report on recommendations; the experts came back with dismal progress reports month after month. *Id.*
- The district court judge even began to meet with the parties on a monthly basis to identify the impediments to reform and assist defendants in overcoming them. State App. 21a.

These efforts were all unsuccessful in persuading Appellants to comply with the policies that they themselves admitted were necessary to remedy the constitutional violations. State App. 14a ("defendants proved incapable of or unwilling to provide the stipulated relief").

After remedial efforts stalled for three years, the *Plata* court issued an order to show cause why the State should not be found in contempt and why a receiver should not be appointed to manage prison health care delivery. State App. 21-24a. The court held a six-day bench trial and found that Appellants were "unwilling or incapable of breaking out of a deeply entrenched bureaucratic mind-set, and have refused or been unable to take the steps necessary to prevent further needless loss of life and suffering among its wards." *Plata* Docket No. 371 (Oct. 3, 2005 Findings) at 37-39. Faced with an intractable situation, the *Plata* court took the extraordinary step of imposing a receivership over the California state prison medical care system. State App. 28-29a ("the

Court is simply at the end of the road with nowhere else to turn," because of "the state's abdication of responsibility," quotation and citation omitted).

Appointment of the Receiver was thus a culminating step designed to ensure compliance with court orders long ignored. The Receiver began running the prison medical system in early 2006. State App. 29-30a. But, even exercising all the powers of the CDCR Secretary related to medical care, the Receiver was unable to remedy the conditions in the prisons because of severe overcrowding. *Ibid.*

The history of *Coleman* is similarly grim. After a trial in 1995, the *Coleman* court held that the Eighth Amendment rights of mentally ill prisoners were violated due to "systemwide deficiencies in the delivery of mental health care." *Coleman v. Wilson*, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995); State App. 30-36a. The court appointed a Special Master to assist Appellants' compliance with the remedial orders. State App. 36a.

For more than a decade, the *Coleman* court issued over 70 orders aimed at eliminating the shortage of beds and space for prisoners in need of psychiatric treatment. State App. 30-31a, 36-46a. The court had to issue orders repeatedly because Appellants failed to effectuate the relief required. For example, on April 17, 2006, defendants filed their third bed plan in response to the court's repeated orders. *Coleman* Docket No. 1800. It was inadequate. *Ibid.*

The *Coleman* court summarized the results of its orders: "The special master reports, the record reflects, and defendants admit, that [Appellants' remedial plan] in no way adequately respond[ed] to the severe shortage of . . . mental health crisis beds that currently exists in the CDCR." *Ibid.* That bed plan

was only the most recent incarnation of similar orders issued throughout the then-eleven year remedial phase of the case. *See also Coleman* Docket No. 3450 ("the State has no current viable bed plan [and] is uncertain as to when [one] can be developed," which the court concluded "demonstrate[s] an unacceptable lack of commitment to its constitutional duty, much less to the orders of this court"). As of the time of trial the State's non-compliance persisted. State App. 77a (noting that *Plata* and *Coleman* courts found on-going violations without objection from the State when the three-judge court convened, and that no motion to terminate under § 3626(b) of the PLRA had been filed).

Court orders to implement Appellants' own mental health program standards met a similar fate. The *Coleman* court ordered Appellants to comply with these standards in June 1997. *Coleman* Docket No. 858. The court allowed Appellants more than 10 years to comply with the standards, and even allowed Appellants to revise them in 2006 (*Coleman* Docket No. 1773), but Appellants never met many of their own standards. *See, e.g.,* Pls.' Trial Exh. P264[2]

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[2] The three-judge court ordered the parties to submit written evidentiary objections to trial exhibits. Trial Tr. 650-651; *see also id.* 635 (noting there were "thousands of objections"); Plata Docket Nos. 1973, 1975 (parties' written evidentiary objections and responses). In its 8/4/09 Order Ruling on Evidentiary Matters, the court ruled that all objections to exhibits cited in its concurrently-filed 8/4/09 Opinion and Order (the subject of these appeals) were overruled, and that it would not rule on objections to exhibits not cited in its order "as we have not relied on such evidentiary material in making our ruling." Plata Docket No. 2198.

Accordingly, per Supreme Court Rule 24.5, trial exhibits cited in this motion that were relied on in the 8/4/09 Order are

(Unmet Need Chart), *Plata* Docket No. 1973 (objection withdrawn); Defs.' Trial Exh. D1020 at 4, *Plata* Docket No. 1975 (no objection); Trial Tr. 915-916; Pls.' Trial Exh. P57 at 353, *Plata* Docket No. 1973 (objection withdrawn); *see also* Defs.' Trial Exh. D1148 at 12, cited at State App. 38, n.16.

Appellants also failed, and continue to fail, to comply with their own guidelines and court orders regarding suicide prevention. *Coleman* Docket No. 3677.

The *Plata* and *Coleman* orders failed to remedy the constitutional violations, even though the State was given every opportunity, and more-than-reasonable time, to comply. The PLRA required no more for the appointment of this three-judge court. *See* 18 U.S.C. § 3626(a)(3)(A), (C).

3. The *Plata* and *Coleman* courts even delayed deciding whether to convene the three-judge panel, to give Appellants additional time to comply. Notwithstanding years of violated orders, the *Plata* and *Coleman* courts did not rush to convene the three-judge district court under the PLRA.

The *Coleman* and *Plata* plaintiffs moved for such a proceeding in November 2006 (State App. 62-63a), but the courts delayed ruling on the motions for eight months. State App. 275-277a, 289a. Each court sought input from either the Receiver (*Plata*) or the Special Master (*Coleman*) regarding how overcrowding affected their respective ability to remedy the

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followed by a reference to that Order (indicating they were admitted), and trial exhibits for which there were no standing objections are followed by a reference to the parties' filings (indicating no objection or that withdrawn).

constitutional violations. State App. 63a. And both courts virtually begged the State to use this time to identify means to remedy the constitutional violations or the overcrowding without judicial intervention. State App. 63a, 286a, 304a (expressing "extreme reluctance" to convene three-judge panel).

The *Plata* Receiver and the *Coleman* Special Master separately reported that their efforts could not remedy the constitutional violations so long as the prisons remained overcrowded. State App. 65-69a, 281-283a (*Plata*), 295-296 (*Coleman*). In the intervening months, the State failed to take any meaningful action to remedy the violations or comply with court orders. The *Plata* and *Coleman* courts thus proceeded to request the establishment of the three-judge panel, finding that the statutory prerequisites were met. State App. 69a, 285-287a, 304a.

Both courts expressed great reluctance to issue their orders. State App. 287a, 304a. The *Plata* court in particular urged the parties to come to a mutual agreement because "[t]his Court would like nothing more than to have the three-judge court be able to enter a consent judgment without the need for a prisoner release order." State App. 287a.

Once convened, the three-judge court itself took yet another step to avoid the need for any federally-imposed remedy. It appointed one current and one former justice of the California Court of Appeal to mediate months of settlement discussions among the parties. State App. 69-70a. Only after that effort failed did the matter proceed to trial. State App. 70a.

4. This Court has no jurisdiction to review the convening of the three-judge panel because the single-judge district court orders responsible for that

were appealable directly to the court of appeals. *See, e.g., Dove v. Bumpers*, 497 F.2d 895, 896 (8th Cir. 1974) (court of appeals has jurisdiction to determine whether three-judge panel properly convened); *Mayhue's Super Liquor Store, Inc. v. Meiklejohn*, 426 F.2d 142, 144-45 (5th Cir. 1970) (same).

The State in fact appealed this issue to the Ninth Circuit Court of Appeals. *Coleman v. Schwarzenegger*, 2007 WL 2669591 (9th Cir. 2007). The Ninth Circuit concluded that the orders were not ripe for review, as no final order had issued. *Id.* Once there is a final order from the three-judge court, Appellants may again take an appeal to the Ninth Circuit Court of Appeals.

III. THIS COURT'S REVIEW IS UNNECESSARY BECAUSE THE THREE-JUDGE COURT CORRECTLY WEIGHED THE EVIDENCE ON WHETHER OVERCROWDING IN CALIFORNIA PRISONS IS THE "PRIMARY CAUSE" OF CONSTITUTIONALLY INADEQUATE MEDICAL AND MENTAL HEALTHCARE.

Appellants' and Appellant-Intervenors' Jurisdictional Statements inappropriately invite this Court to second-guess the three-judge district court's factual determination that overcrowding was the primary cause of the constitutional violations in this case. CCPOA joins in Appellees' arguments on this point as well.

The evidence amply supports the district court's extraordinarily detailed opinion finding that overcrowding is the primary cause of the unconstitutional conditions in California prisions. Evidence was taken in a two-month trial, which included former heads of

prison systems in California, Texas, Washington, Maine and Pennsylvania—most of whom had never previously testified on behalf of prisoners. State App. 80-81a. This Court has no compelling reason to review the three-judge court's finding, which was in all events correct.

1. The "primary cause" of a constitional violation is a question of fact under the PLRA. The statute provides that a "three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that" prison "crowding is the primary cause of the violation of a Federal right." *See* 18 U.S.C. § 3626(a)(3)(E).

"Clear and convincing" is a standard of evidentiary proof. *See Addington v. Texas*, 441 U.S. 418, 424-425 (1979) ("clear and convincing evidence" is "standard of proof" that lies "between a preponderance of the evidence and proof beyond a reasonable doubt"); *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (same). By incorporating it into the PLRA, Congress necessarily conveyed that this determination is factual in nature. Federal courts applying the PLRA's "primary cause" requirement have uniformly held it is a factual determination. (*See, e.g., Tyler v. Murphy*, 135 F.3d 594, 596 (8th Cir. 1998) (reversing single-judge prisoner release order because it was entered "without the requisite evidentiary hearing and mandated findings of fact" relating to "primary cause"); *Roberts v. Mahoning County*, 495 F.Supp.2d 713, 715 (N.D. Ohio 2006) (three-judge panel addressing which party has "burden of proof" to establish constitutional violations where district court convened panel *sua sponte*); *see also Guillen v. Thompson*, 2009 WL 2513494 at *5 (D. Ariz. 2009) (state-defendant arguing that prisoner release order

improper because pro se plaintiff "has not proffered any evidence or proof that overcrowding is the cause of his alleged violation," as required under PLRA). These courts generally did what the three-judge district court here did: hold or require an evidentiary hearing or trial (*cf. Tyler*, 135 F.3d at 596), or enter consent decrees (*Roberts v. Mahoning County*, 495 F. Supp. 2d 719 (N.D. Ohio 2007)). There is no serious dispute that the PLRA's "primary cause" determination requires a factual rather than legal inquiry.

Appellants' only citation to the contrary is a footnote from the three-judge district court's decision. State J.S. 9 and 18, both citing State App. 126a n.55. But there, the court addressed a different and narrower point: although "primary cause" is a question for the three-judge panel, it is allowed to consider expert opinion testimony going to "the ultimate issue" in the case. *See* State App. 126a n.55. To the extent the court stated loosely that "the primary cause issue is ultimately a question of law," that is incorrect. Causation is a factual question reviewed only for clear error. *See Miller v. Johnson*, 515 U.S. 900, 917 (1995). Moreover, the court did not hold that the entire inquiry is legal in nature, and sitting as a trial court, could not have meant any such thing. The only arguably legal issue is whether the evidence is sufficient to satisfy the "clear and convincing" standard. It is, and the State never argues in its Jurisdictional Statement that the evidence was insufficient to meet this standard.

Appellants also argue that the PLRA should be interpreted to require that overcrowding be a "but for" cause of the constitutional violation. State J.S. 20-24. This argument was not presented to the lower court and therefore waived, but in all events it is

plainly wrong. It would have been simple enough for Congress to make "proximate cause," "but for cause" or "exclusive cause" the statutory standard. Instead it selected "primary cause," a distinct and readily comprehensible phrase. *See* 18 U.S.C. § 3626(a)(3)(E)(i). The three-judge district court properly interpreted the PLRA's "primary cause" requirement, and even adopted Appellants' definition. *See* State App. 78-79a. This Court need not revisit that holding.

Neither Appellants nor Appellant-Intervenors ever hint what the "primary cause" of the constitutional violations in *Plata* and *Coleman* might be, if not the extreme and endemic overcrowding in California prisons. Instead they attempt to re-frame the question as one of legal, "but-for" causation, heedless of the PLRA's plain words.

2. The district court correctly determined that overcrowding strains existing correctional officer staffing levels, which directly impacts delivery of medical and mental care for inmates. State App. 110-112a. This finding is borne out by the testimony provided by custodial staff.

The court considered officer testimony that in some prison housing units, one or two correctional officers s pervise approximately 200 inmates. State App. 111a. It found that when a prisoner medical emergency arises under these circumstances, custodial staff "can only sound the alarm, make frantic telephone or radio calls, and hope for backup." *Ibid.* For example, Officer Rowlett testified that if officers respond to a serious medical emergency (as she and her partner had to with an inmate who suffered three seizures a day), no correctional officer is available to supervise the other almost two hundred inmates, creating a safety hazard for inmates and staff. Trial

Tr. 678-680. Under these circumstances corrections officers must quickly decide whether an apparent health emergency is real, or a diversion designed to distract officers, under peril of their own safety and that of the sick inmate. State App. 111a. This is unsafe for inmates and staff.

The three-judge court also relied on evidence from the *Plata* Receiver that custodial understaffing and the State's lack of an "organizational structure and processes" for escorting prisoners to medical appointments results in "denial of timely access to health care services and substantially increases the risk that [prisoners'] health will further deteriorate." State App. 111a-112a, citations and quotations omitted. Inadequate correctional staffing "caused significant delays in treatment." State App. 112a, citation and quotation omitted. The State's own mental health expert testified that the "shortage of correctional officers statewide compared to the number of inmates impedes the delivery of mental healthcare" to the *Coleman* class. *Ibid.*, citation and quotation omitted.

After considering this and extensive other evidence, the three-judge district court concluded that "[a] reduction in the crowding of California's prisons would help ease the burden on the custodial staff and permit staff members to better monitor inmates for medical or mental health problems and to deliver inmates for necessary care." State App. 112a. As Appellees explain, the State does not deny that overcrowding strains correctional staff's ability to provide services to prisoners, including access to medical and mental healthcare. *See* Appellees' Mot. 13-17.

IV. THERE IS NO ORDER REVIEWABLE FOR COMPLIANCE WITH THE PLRA'S NEXUS AND NARROW-TAILORING REQUIREMENTS.

These appeals are premature because there is no final order for this Court to review. Dismissal is proper on this ground alone. *See* Appellees' Mot. 8-10. The three-judge court simply has not issued any order this Court can review for consistency with the PLRA's "nexus" and "narrow tailoring" requirements.

The three-judge court acted with restraint by allowing the State to submit a proposed plan, rather than ordering it outright to reduce its prison population in some judicially-selected way. It gave the State forty-five days to submit a plan that would gradually reduce the prison population to 137.5% of design capacity over two years. State App. 255-256a. True to form, Appellants submitted a plan aimed at reducing the prison population to 166% of design capacity over 5 years—which the court rejected on that ground and for multiple other failures to comply with its directive. *Plata* Docket No. 2269. The three-judge court gave the State another 21 days to comply, and the State filed a new plan on November 12, 2009. *Plata* Docket No. 2274. Only if the three-judge court determines that the State's new plan does not comply will the court develop a plan independently.

Appellants and Appellant-Intervenors argue that the order to develop a plan to reduce the prison population to 137.5% of capacity within two years is a "prisoner release order" under the PLRA. State J.S. 1-2a; Intervenors' J.S. 5. That is incorrect because the only actual injunction the court has issued is to formulate a plan for reaching that goal.

Intervenors argue that the three-judge district court should have ordered other alternatives to a population cap. Intervenors' J.S. 13. But that is not the role of a three-judge district court under the PLRA; such a panel is convened expressly for the purpose of considering a "prisoner release order." *See* 18 U.S.C. § 3626(a)(3)(B), (E). All other judicially-available remedies were already employed to no avail by the *Plata* and *Coleman* courts.

CONCLUSION

For all these reasons, this Court should dismiss the appeals and/or affirm the three-judge district court's order.

Respectfully submitted,

DANIEL M. LINDSAY
DAVID A. SANDERS
CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION
755 Riverpoint Drive
Suite 200
West Sacramento, CA 95605
(916) 372-6060

LAURIE J. HEPLER
Counsel of Record
GREGG MCLEAN ADAM
GONZALO C. MARTINEZ
NATALIE LEONARD
CARROLL, BURDICK & MCDONOUGH LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900

Attorneys for Appellee Intervenor California Correctional Peace Officers' Association

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No. 09-416

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et. al.*,

Appellants,

v.

MARCIANO *PLATA* AND RALPH *COLEMAN*, *et. al.*,

Appellees.

Appeal from the United States District Courts
For the Eastern District of California and
The Northern District of California

JOINT MOTION TO DISMISS OR AFFIRM APPEAL OF STATE DEFENDANTS

Michael Bien
Jane E. Kahn
Ernest Galvan
Amy Whelan
Lisa Ells
ROSEN, BIEN & GALVAN, LLP
315 Montgomery St., 10th Fl.
San Francisco, CA 94104
Counsel for Coleman Appellees

Donald Specter
Counsel of Record
Steve Fama
Alison Hardy
Sara Norman
Rebekah Evenson
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621
Counsel for Coleman and Plata Appellees

December 7, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the court below clearly erred when it found that prison "crowding is the primary cause of the violation of a Federal right," 18 U.S.C. § 3626(a)(3)(E)(i), and whether it was error for the court below to apply the legal definition of "primary cause" urged by the State appellants.

2. Whether, after finding that prison overcrowding is the primary cause of the constitutional violations, and that reducing crowding is a prerequisite to remedying the violations, the court below clearly erred by ordering the State to develop a plan to reduce the prison population.

3. Whether the single judge courts in *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger* clearly erred when they found that the factual predicates had been satisfied for establishing a three judge district court pursuant to the Prison Litigation reform Act ("PLRA"), 18 U.S.C. § 3626 (1996).

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Pursuant to Rule 18.6, appellees move to dismiss the appeal or affirm the order below on the ground that the appeal is premature and the questions raised are so insubstantial as not to need further argument.

JURISDICTION

The State invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1253. For the reasons described *supra* at 7-9, this Court lacks jurisdiction.

STATEMENT OF THE CASE

The overcrowding in California's prisons is unprecedented. The prisons were built to house 80,000 prisoners. State App. 57a. They now house nearly double that number. State App. 9a. Some prisons are crowded to 300% of capacity. State App. 10a. No other state faces a comparable crisis. In 2006, Governor Arnold Schwarzenegger declared a State of Emergency because the severe prison crowding "has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them" making prisons places of "extreme peril to the safety of persons." App. 2a, 14a. He declared that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding." App. 12a. The State of Emergency is still in effect. State App. 62a.

The most visible consequence of the gap between the number of prisoners and the capacity of the prisons is the overuse of "ugly" beds—more than ten thousand double and triple bunks "crammed into gyms and dayrooms that were never meant to be

used for housing." State App. 100a (quotation marks omitted); *see also* App. 19a-23a (photographs of ugly beds). The former head of Texas prisons testified that "'[i]n more than 35 years of prison work experience, I have never seen anything like it.'" State App. 100a.

According to a former high-ranking California prison official: "the risk of catastrophic failure in a system strained from severe overcrowding is a constant threat.... [I]t is my professional opinion this level of overcrowding is unsafe and we are operating on borrowed time." State App. 84a-85a.

Nowhere is this risk of catastrophic failure felt more acutely than in the health care system.

California prisons are unable to provide even minimally adequate health care – there are too few clinical facilities to screen and treat the vast number of prisoners who need care, too few medical and mental health beds to house prisoners in crisis, too few primary care doctors and mental health professionals to treat ill prisoners, too few medical or mental health specialists to meet the needs of the overwhelming number of prisoners who need such care, too few custody officers to escort prisoners to medical or mental health visits, completely overwhelmed medication delivery systems and record keeping systems, and textbook breeding grounds for outbreaks of infectious diseases and for mentally ill prisoners to decompensate. As a result, the serious medical and mental health needs of prisoners are unmet, or are mistreated and prisoners become sick and die at an alarming rate. State App. 141a-142a.

1. This appeal arises out of two separate actions to remedy unconstitutional health care in the

prisons, *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger*. The *Plata* plaintiffs, prisoners with serious medical needs, filed suit in 2001 claiming that the State is failing to provide constitutionally adequate medical care. State App. 13a. The State agreed to a settlement in 2002, conceding that the prison conditions are unconstitutional and judicial oversight is necessary under the PLRA. 6/13/02 Stipulation and Order, ¶29 (*Plata* Docket 68). However, "defendants proved incapable of or unwilling to provide the stipulated relief." State App. 14a.

The *Coleman* plaintiffs, prisoners with serious mental disorders, filed suit in 1990 challenging the constitutionally inadequate mental health care in California prisons. State App. 32a. After trial, the district court in 1995 found the mental health care system so deficient as to violate the Eighth Amendment of the United States Constitution. State App. 33a. The district court entered well over seventy orders over the course of fourteen years in a futile attempt to remedy the violations. State App. 38a-39a, 142a.

The reason constitutional violations have persisted for decades despite intensive judicial oversight is straightforward: prison overcrowding. State App. 141a-142a, 295a-296a, 299a, 304a. The *Coleman* Special Master stated "[o]ver the past 11-plus years, much has been achieved, and many of the achievements have succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair." Exh. P-35 at 16-17, State

App. 41a.[1] According to the *Plata* Receiver, "[i]t will not be possible to raise access to, and quality of, medical care to constitutional levels with overpopulation at its current levels." Exh. P-55 at 1, 11/3/08 Order at 12 (*Plata* Docket 1757) (granting judicial notice).

2. In November 2006, after the Governor issued his state of emergency proclamation, App. 1a, the plaintiffs in both cases filed motions to convene a three-judge court to consider population reduction remedies pursuant to the PLRA. State App. 62a-63a. Both courts delayed hearing these motions to give the Receiver and Special Master an opportunity to report about the impact of overcrowding on their remedial efforts, and both courts urged the State to use the delay to identify alternative remedies for the constitutional violations or overcrowding without judicial intervention. State App. 63a, 304a.

Both the Receiver and the Special Master reported that crowding stymies their remedial efforts.

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[1] The parties submitted their full sets of exhibits at once, and each party was provided an opportunity to object. *See* Trial Tr. 650-651. For the most part, the lower court did not rule individually on the offered exhibits, Trial Tr.11, but instead overruled all objections based on relevance and cumulativeness, Trial Tr. 650-651, and admitted all evidence cited in its August 4 order. 8/4/09 Order Re Evidentiary Matters at 1-2 (*Plata* Docket 2198). As to all other objections, the court did not rule. *Id.* Pursuant to Rule 24.5, in this Motion and appellees' Motion in related Case No. 09-553, appellees cite relevant pages of the August 4 opinion or to the transcript where such exhibit was admitted, as applicable. All other exhibits cited in appellees' motions that were not expressly admitted by the court are exhibits as to which no party interposed an objection.

Exhs. P-26, State App. 86a; P-27; D-1292, State App. 41a. The State, meanwhile, failed to develop other remedies on its own.

On July 23, 2007, the *Plata* and *Coleman* courts issued separate orders requesting that a three-judge court be convened. State App. 65a. On July 26, 2007, the chief judge of the Ninth Circuit Court of Appeals ordered, without objection, that a single three-judge court be convened to consider population reduction in both cases simultaneously, in the interests of consistency and judicial economy. State App. 69a.

Despite the urgency of the issues, the three-judge court stayed discovery and delayed consideration of this matter for more than seven months, referring the matter to a settlement referee to give the State another opportunity to resolve the crowding problem on its own. State App. 69a-70a. The State again failed to do so.

3. Commencing November 18, 2008, the lower court held fourteen days of trial and two days of closing argument. State App. 70a. The court issued a tentative ruling on February 9, 2009, *id.*, and issued the order on appeal on August 4, 2009, requiring the State to draft a population reduction plan. State App. 255a-256a. Only after further proceedings will the lower court issue its final order requiring the State to reduce its prison population. *Id.*

The court found that plaintiffs have demonstrated all elements required by the PLRA for issuance of a prisoner release order. State App. 253a-254a. It found that "clear and convincing evidence establishes that crowding is the primary cause of the

unconstitutional denial of medical and mental health care to California's prisoners." State App. 82a. Defendants' mental health expert, Dr. Packer, conceded this point. Trial Tr. 1092:23-1094:6. "In [his] opinion, the primary cause of the constitutionally inadequate mental health care in California's prisons is that California 'now has many more acutely mentally ill individuals and at a level of more severity than had been anticipated when the prisons were built' and that the existing prison space was 'not designed to meet the needs' of a mentally ill population." State App. 138a (quoting Packer). The current and two past directors of CDCR all concede that crowding adversely affects nearly every aspect of prison operations, including the provision of health care. State App. 82a-84a.

The court also found and concluded that "[r]educing the population in the system to a manageable level is the only way to create an environment in which other reform efforts, including strengthening medical management, hiring additional medical and custody staffing, and improving medical records and tracking systems, can take root in the foreseeable future." State App. 168a (quotation marks omitted).

4. The court then addressed appropriate relief. Relying on testimony from State prison officials, county jail administrators, the former head of the California prison system, and the former heads of the Texas, Pennsylvania, Washington State, and Maine prison systems, the court concluded that "a cap of no higher than 137.5% is necessary." State App. 169a, 175a-181a. A reduction to 137.5% of design capacity amounts to a population reduction of 40,000

prisoners. 11/12/09 State Plan at 1 (*Plata Docket* 2274-1). The court ordered the State to develop a plan to accomplish such a reduction. State App. 255a-256a.

The court gave substantial consideration to potential impacts of the reduction in the prison population, and found that the evidence shows that "the state could comply with [its] population reduction order without a significant adverse impact upon public safety or the criminal justice system's operation." State App. 187a-188a.

In developing a population reduction plan, the State "would not be required to throw open the doors of its prisons, but could instead choose among many different options or combinations of options for reducing the prison population." State App. 173a-174a. Those methods include providing good time credits to prisoners; diverting low-level, low-risk offenders and parole violators who clog prison reception centers but spend very short periods of time in prison; and increasing rehabilitative programming to reduce the number of offenders coming to prison in the first place. State App. 192a-216a. Such measures have already been proposed by the Governor, and overwhelming testimony affirms that such measures "either have no impact on or reduce the recidivism rate" and therefore "would not adversely affect public safety." State App. 249a; *see also* State App. 196a-220a.

5. The State has conceded that it is possible to accomplish a reduction safely. State App. 317a. On November 12, 2009 the State submitted a plan to gradually reduce its prison population using the well-accepted, safe methods examined by the three-judge

court, among others. 11/12/09 State Plan. The parties' comments on the State's plan are due December 7, 2009. 11/18/09 Order Inviting Responses (*Plata* Docket 2275).

THIS APPEAL IS PREMATURE

The State's appeal is premature just as its request for a stay was premature. Repeating arguments from its unsuccessful stay application, the State mischaracterizes the August 4 order on appeal as a "prisoner release order." *See* State's Jurisdictional Statement ("J.S.") 2, 11. It also contends that, if allowed to stand, the three-judge court's order "will obtain no review at all." J.S. 11. These arguments fail.

The August 4 order is not a prisoner release order; it merely requires the State to develop a plan for reducing the prison population. State App. 255a-256a, 307a. It contemplates several interim steps to occur before the three-judge court issues a "prisoner release order," State App. 256a, which may affect what any such order ultimately requires. This process is underway and incomplete.

Subsequent acts since this Court's denial of the State's stay application underscore the contingencies that separate the August 4 order from an actual prisoner release order. Rather than abide by the import of this Court's denial of its stay request, the State failed to submit a population reduction plan in accordance with the August 4 order, and instead filed a grossly inadequate plan which was promptly and appropriately rejected. 10/21/09 Order (*Plata* Docket 2269). Only after the three-judge court implicitly threatened the State with contempt did the State

submit a plan that approaches compliance with the August 4 order. The three-judge court will consider the parties' comments on this plan before issuing a "prisoner release order." 11/18/09 Order Inviting Responses.

This Court correctly recognized the preliminary posture of the district court proceedings when it denied the State's stay request. See *Schwarzenegger v. Coleman*, No. 09A234, 2009 WL 2915066, at *1 (U.S. Sept. 11, 2009). This Court took "note of the fact that the three-judge court has indicated that its final order will not be implemented until this Court has had the opportunity to review the district court's decree." *Id.* This Court thus recognized that the State will have an opportunity to appeal any "final order." *Cf. Alabama Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 363 (1951) (declining to address three-judge court's issuance of temporary restraining order).

More generally, prudential concerns counsel against exercising jurisdiction. This Court has interpreted § 1253 with an eye to the "overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzales*, 419 U.S. at 98; *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970). The August 4 order's description of future proceedings raises the prospect of "piece-meal appellate review" disfavored by the Court. *Goldstein*, 396 U.S. at 478. The Court's intervention at this early stage would, in effect, splinter appellate proceedings and foreclose the possibility of resolving all issues at once. *See, e.g., Citizens United v. F.E.C.*, 128 S. Ct. 1732 (2008) (dismissing appeal for want of jurisdiction after having directed briefing on

jurisdiction under § 1253); *Nike, Inc. v. Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., concurring) (writ of certiorari improvidently granted because "more ... issues might well remain in this case").

The Court should decline appellate review at this juncture and dismiss the State's appeal. If and when appellants appeal from a final order, appellees will support an expedited briefing schedule in this Court to promote quick resolution.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Even if the Court has jurisdiction at this preliminary stage, the Court should summarily affirm the August 4 order.

The striking thing about this case is the narrowness and fact-intensive nature of the disputed issues. Despite the State's invocation of federalism principles, there is no question that there are federal constitutional violations that require judicial oversight of the California prison system. The only dispute is over what form the relief will take. Moreover, most of the underlying disputes are questions of degree.

This case is not about whether the State is currently violating the Eighth Amendment rights of appellees. The State admits in *Plata* that there are "current constitutional violations" and that while it challenges particular remedies, it does not seek to terminate judicial oversight. *Plata v. Schwarzenegger*, No. 09-15864 (9th Cir. Sept. 16, 2009) (audio recording of oral argument at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000003923, at minutes 9:53-10:13). Nor has

the State sought to terminate judicial oversight in *Coleman*. Under the PLRA, judicial oversight *must* be terminated if there are no "current and ongoing violation[s]" of federal rights. 18 U.S.C. § 3626(b)(2), (3).

The State also concedes that crowding is one cause of the current constitutional violations. Trial Tr. 2953:6-2954:5 (closing argument). Its main dispute is with the lower court's finding that crowding is the "biggest" cause. *Id.*

The State likewise agrees that crowding imperils the health of inmates, App. 14a, that reducing crowding immediately is essential, *id.*, and that it can safely reduce the prison population to 137.5% of design capacity. State App. 317a. Nonetheless, it challenges the precise contours and timeframes for an order requiring such reduction.

Finally, the State admits that the single judge district courts had previously issued orders for less intrusive relief over a period of two decades, but disputes whether the lower court was convened after giving the State a "reasonable" amount of time to comply with earlier orders.

Each of these are questions of fact, and on each the lower determinations will be reviewed for clear error. Fed. R. Civ. P. 52(a)(6); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995). Because the State has failed to identify a single factual finding it argues was erroneous, the order below must be affirmed.

I. The Three-judge Court Correctly Applied The State's Proposed Definition Of "Primary Cause."

The lower court's finding that overcrowding is the "primary cause" of the ongoing constitutional violations does not present a substantial question for review.

It does not involve a substantial question of *law* because the lower court's interpretation of the term "primary cause"– the "cause that is 'first or highest in rank or importance; chief; principal'"–was adopted verbatim from the definition proposed by the State. State App. 78a-79a; J.S. 19.

Nor does the State's appeal involve a substantial question of *fact*. The State has conceded here that crowding "can exacerbate the deficiencies that caused the constitutional violations." J.S. 23. Below it conceded that prison overcrowding is *one of the causes of those constitutional violations*. Trial Tr. 2953:6-2954:5 (closing argument).

The only question left is the degree to which crowding, as opposed to other factors, is causing the violations. *Id.* The State argues that "the record belies" the lower court's conclusion that crowding is the primary cause, and that in fact crowding is merely a "secondary" or "contributing" cause. J.S. 18, 19, 23. That question is highly fact-intensive, and will be reviewed for clear error. *Miller v. Johnson*, 515 U.S. 900, 917 (1995).

A. Overwhelming Evidence Supports The Three-Judge Court's Finding That Crowding Is The Primary Cause Of The Constitutional Violations.

The three-judge court's conclusion that the evidence at trial "overwhelmingly establishes . . . that crowding creates numerous barriers to the provision of medical and mental health care that result in the constitutional violations" was not clear error. State App. 80a-81a.

The State's expert conceded that crowding is the primary cause of some of the violations at issue in this case, Trial Tr. 1092:23-1094:6, and the current and former Secretaries of California's prison system affirm that crowding is a major impediment to remedying the conditions. Trial Tr. 1683:11-20, 1684:5-16; Woodford Supp. Report ¶ 3.

One former head of corrections in California testified that she "'absolutely believe[s]'" the primary cause of the medical deficiencies is overcrowding. State App. 126a. The former head of Texas prisons agreed, as did the top corrections officials in Pennsylvania, Washington and Maine. State App. 126a-128a.

That consensus reflects the reality that the unprecedented level of overcrowding in California prisons is an insuperable obstacle to solving the problems of constitutionally deficient mental and physical health care. The following supporting findings are uncontested:

- *Crowding Causes Deadly Delays in Emergency Response.* Because of the extremely crowded living conditions, it can be nearly impossible for prison staff

to identify or respond adequately to medical emergencies. Trial Tr. 380:1-381:7, 382:14-383:3. One former Secretary of CDCR described how a prisoner was killed in the middle of a crowded gymnasium converted to overflow housing. Because the gym was so crowded, prison staff didn't even know about the death – much less provide emergency medical aid – for hours. Trial Tr. 382:2:-383:3.

• *Lack of Space to Deliver Health Care.* The three-judge court found that "[o]ne of the clearest effects of crowding is that the current prison system lacks the physical space necessary to deliver minimally adequate care to inmates." State App. 85a. One former Secretary of CDCR testified that "the lack of space is not only a housing issue, but it's impacting other factors, like delivery of healthcare services, the lack of offices, and clinical space." Tilton Dep. 80:11-15.

• *Shortage of Medical Beds for Acutely Ill Prisoners.* Defendants' expert testified that prisoners are denied adequate care because of a shortage of medical housing for acutely ill prisoners. Exh. D-1019 at 11, State App. 82a; State App. 91a-92a. With shocking regularity during 2007 and 2008, mentally ill prisoners killed themselves days or weeks after clinicians prescribed immediate placement in crisis beds that the prisoner never reached because there were too few crisis beds for the number of prisoners who need them. *See, e.g.*, Exh. P-447-R at 215-19; Stewart Report ¶ 173; P-564-R; Stewart Supp. Report ¶¶ 100, 109-110; P-575-R.

• *Mental Health of Prisoners Deteriorates in Crowded Prisons.* Prisoners' mental health deteriorates when they live in the packed, noisy,

dangerous conditions caused by overcrowding, and this in turn increases the demand for mental health services in an already overwhelmed system. The mental health bed shortages "have created a destructive feedback loop that is now endemic to the CDCR's mental health care delivery system. Inmates denied necessary mental health placements 'are decompensating and are ending up in mental health conditions far more acute than necessary .... creat[ing] a cycle of sicker people being admitted, with greater resources necessary to treat them, which then creates even further backlog in an already overwhelmed system.'" State App. 99a.

• *Increased Lockdowns Due to Crowding Impede Access to Care.* Because the prisons are so crowded, inmate control becomes more difficult, and prison administrators rely heavily on lockdowns to exert control. State App. 116a-117a. During lockdowns, prisoners are unable to leave their housing units to go to health clinics; instead, medical staff must go cell-to-cell to see prisoners. State App. 117a-118a. This results in serious delays in access to care, and inadequate care. State App. 116a-188a.

• *Crowding Exacerbates Mental Illness.* Also during lockdowns – and in crowded prisons generally – mentally ill prisoners decompensate or become suicidal, placing further strain on mental health resources. State App. 118a, 121a-123a. Both State and plaintiff experts described in detail the deteriorating mental health of prisoners subjected to extended lockdowns and crowded conditions, some of whom attempted suicide, and all of whom required crisis level care but could not receive it because the prisons are so crowded there are simply not enough

beds. Haney 8/15/08 Report ¶¶ 164-167, 257-260; Trial Tr. 354:25-355:17, 1105:13-1106:25, 1107:1-20.

• *Crowding Results in Inadequate Screening of New Prisoners.* Prison reception centers, where prisoners are processed on arrival, are so crowded that they have no place to properly screen new prisoners. As a result, prisoners' "health needs are not identified" and "cannot be treated. In addition, inmates whose needs are not identified may be placed in a setting that will exacerbate existing but unidentified health problems." State App. 89a, 87a-88a.

• *Spread of Infectious Diseases.* As the Governor proclaimed, overcrowded living conditions increase the risk of transmission of infectious diseases. App 2a; State App. 101a-102a.

• *Shortages of Health Care Staff.* Because the prisons are overcrowded, there are simply too few health care practitioners to address the basic needs of prisoners. State App. 104a-109a. Overcrowded prisons provide such "uninviting" working conditions that prisons cannot recruit or retain enough staff. State App. 154a.

• *Overwhelmed Medication Management Systems, Medical Records Systems, and Specialist Referral Systems.* The sheer number of prisoners housed in institutions built for half that number has overwhelmed the prisons' medication management system, its medical records system, and its ability to provide specialty medical care. State App. 112a-121a. As a result, the prisons are unable to deliver the right medication to the right prisoner in a timely manner, State App. 112a-114a, to identify what health care services a prisoner may need. State App.

118a-121a, or to provide urgent specialty care to prisoners who need it. State App. 114a-116a.

• *Prisoners Are Dying From Inadequate Care.* As a direct result of all of these problems caused by crowding, there are "unacceptably high numbers of both preventable or possibly preventable deaths, including suicides, and extreme departures from the standard of care." State App. 123a. Prison suicides have been steadily rising in California, with crowding-related causes among the major contributing factors. Exh. D-1014 at 2, D-1281 at 680, State App. 124a. Within days of each other in early 2007, two prisoners hanged themselves at the prison system's highest-acuity mental health unit; the cells where they were housed were in such high demand due to crowding that the prison could not take them off line to remove "attachment points" for hanging that were involved in prior suicides. Trial Tr. 769:5-775:17, 778:19-779:13; Exhs. P-588-589.

In sum, the evidence overwhelmingly establishes and the lower court correctly found that the "[t]he crushing inmate population has strained already severely limited space resources to the breaking point, and crowding is causing an increasing demand for medical and mental health care services, a demand with which defendants are simply unable to keep pace." State App. 140a. The "only conclusion that can be drawn from the wealth of clear and convincing evidence . . . is that the unconstitutional denial of adequate medical and mental health care to California's inmates is caused, first and foremost, by the unprecedented crowding in California's prisons." State App. 143a.

B. The State Fails To Raise Any Substantial Question Regarding The Definition Of "Primary Cause."

The State attempts to manufacture a legal dispute about the meaning of the statutory term "primary cause." J.S. 18-23.

For the first time in this litigation, the State now argues that "primary cause" means the "but for" cause. J.S. 20. But it is far too late for the State to be proposing a new definition. After all, the three-judge court adopted verbatim the definition of "primary cause" proposed by the State below. State App. 78a-79a. The State cannot now argue for a different definition. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Even if the Court could consider a legal argument raised for the first time on appeal, the new definition of "primary cause" proposed by the State is not consistent with the statute. And even if the State's new definition were correct, it is satisfied here: the lower court's findings demonstrate that the violations would not have continued but for the overcrowding. *See, e.g.*, State App. 145a, 155a.

The State argues that because crowding exacerbates constitutional violations, it must be merely a "secondary" cause. J.S. 23. Not only does this point defy logic, but it raises a question of fact that the lower court resolved against the State.

The State also contends that overcrowding cannot be the "chief" cause of the constitutional violations because there are other causes of the violations. J.S. 19. But the State acknowledged that to satisfy the statute, crowding need not be the "only" cause, it must simply be the "biggest cause." Trial Tr.

2960:12-15 (closing argument). As the three-judge court correctly found, the PLRA's use of the term "primary" to modify "cause" indicates that Congress understood that there can be multiple causes. State App. 79a.

Finally, the State argues that crowding cannot be the primary cause because reducing the population will not, by itself, "largely" cure the constitutional violations. J.S. 19-21. Under those circumstances, according to the State, crowding can only be a "contributing factor" or a "secondary" cause. J.S. 19, 23. But that argument too ignores the possibility of multiple causes, each of which contribute to the problem. Congress did not prohibit courts from granting relief from overcrowding unless that remedy alone would cure all constitutional deficiencies, and its "primary cause" language recognizes the possibility of multiple contributing causes.

The State's construction would lead to absurd results and raise questions about the statute's constitutionality because it would prevent a court from remedying the main cause of a constitutional violation unless the relief would also simultaneously resolve all deficiencies. That was not Congress' intent.

The three-judge court put it succinctly: "The PLRA does not require that a prisoner release order, on its own, will necessarily resolve the constitutional deficiencies found to exist in *Plata* and *Coleman*. All that the PLRA requires is that a prisoner release order be a necessary part of any successful remedy. If all other potential remedies will be futile in the absence of a prisoner release order, 'no other relief will remedy the violation.'" State App. 144a (quoting

18 U.S.C. § 3626(a)(3)(E)(ii)). The statute is satisfied when a prisoner release order is *necessary* but not *sufficient* to remedy the violation. State App. 134a.

Nonetheless, as a practical matter, eliminating crowding will "largely extinguish" the constitutional violations. J.S. 21. Once crowding is reduced, the *Plata* Receiver and the State will be able to implement court orders already in effect, and to correct ongoing constitutional violations. *See* State App. 158a-159a.

C. The State Was Not Prohibited From Gathering Or Introducing Any Evidence About Current Conditions.

The State complains, falsely, that it was "prohibited from gathering and introducing evidence" regarding current conditions in the prisons, and "prevented" from "showing that the previously existing federal violations had been mitigated or even remedied in the interim by measures directed at other causes." J.S. 25.

At the same time, however, the State concedes in *Plata* that there are "current constitutional violations" and it has never sought to terminate judicial oversight in either *Plata* or *Coleman*, as would necessarily occur if the constitutional violations had been remedied. 18 U.S.C. § 3626(b)(2), (3).

The State does not cite to any point in the record where it was barred from introducing a single item of evidence. *See* J.S. 24 (citing State App. 77a (court declined to rule on constitutionality), 78a n.42 (court declined to permit evidence "relevant *only* to determining whether the constitutional violations

found by the *Plata* and *Coleman* courts were 'current and ongoing'")) (emphasis added); J.S. 25 n.8 (citing similar statements by court during pretrial conference and trial); *see also* 8/4/09 Order Re Evidentiary Matters (*Plata* Docket 2198).

The State introduced voluminous evidence about current conditions within the prisons in connection with its contentions that overcrowding is not the primary cause of some of the violations and that other relief will remedy the violations. The lower court admitted this evidence and considered it for those proper purposes.

The State's medical and mental health experts toured the prisons, including only weeks before trial; viewed the medical facilities; interviewed medical personnel and other prison staff, as well as prisoners; and reported and testified about the conditions they found. *See, e.g.*, Exhs. D-1016, D-1017, D-1019, State App. 82a, D-1020; Trial Tr. 1071-1143, 1191-1253. The State introduced evidence about current health care statistics, current medical and mental health care staffing, and institutional populations. *See, e.g.*, Exhs. D-1233; D-1149, D-1259-1, D-1235-2; Trial Tr. 1272:12-21. The State also introduced into evidence the reports of the *Coleman* Special Master and the *Plata* Receiver, which include extensive discussion of current conditions in the prisons. *See, e.g.*, Exhs. D-1087-D-1100, State App. 150a, D-1106, D-1224-1231, D-1110-1112, D-1292, State App. 41a, D-1293, D-1294, D-1108, State App. 49a. State witnesses, including key officials in charge of prisons and prison medical and mental health care, presented exhaustive testimony about current conditions, including the extent of overcrowding in the system,

staffing levels, the use of ugly beds, medication management problems, suicides and other deaths, and health care expenditures. *See, e.g.*, Exhs. D-1000-1002, D-1004-1008, Trial Tr. 836-944, 1891-1940, 1668-1709, 1734-1772, 755-823, 724-754; Brewer Dep. 135:5-138:5.

Having failed to identify a single piece of evidence on this point that was not admitted, and having never made an offer of proof as to any such evidence, the State cannot prove any error or prejudice from the three-judge court's evidentiary or discovery rulings.

Nor was the State precluded from *gathering* any evidence about current conditions in the prisons. State officials control the prisons and its documents and information; the State's experts had full access to tour the prisons, to talk to prison medical staff, and to review all relevant data and information in the possession of the prison medical staff and Receiver. *See, e.g.*, 9/5/08 Fama Decl. ISO Plf's Response to Def. Request for Evidence ¶¶ 2-5 & Exh. A (*Plata* Docket 1453); Thomas 2008 Report at 1; Packer 8/15/08 Report at 1-2.

Indeed, the State neglects to mention that it obtained the fifteen specific items of data that it claimed were the "best evidence" of the current "status of the delivery of medical care and the Receiver's plans for implementing improvements in medical care." 8/29/08 Def. Req. for Evidence at 4 (*Plata* Docket 1436). The Receiver issued a public report that provided each item of data requested by the State, and the court held that such report would be admissible at trial. 9/5/08 Order (*Plata* Docket 1450). Thus, the State was not prevented from

obtaining or submitting any of the information it described as the "best evidence" of current conditions.

While the three-judge court allowed the State to gather and introduce evidence about current conditions within the prisons, it nonetheless properly limited the scope of its review to the question of remedy.

Under the PLRA, the proceedings in the three-judge court were solely about whether to enter a prisoner release order to remedy the ongoing constitutional violations that the single judge courts had found to exist. 18 U.S.C. § 3626(a)(3)(E). The questions whether there is a constitutional violation in the first place, whether there is still an ongoing constitutional violation after the passage of time, and whether prospective relief should be maintained or terminated, are questions reserved to the single judge district courts. 18 U.S.C. § 3626(a), (b), (e). Accordingly, the three-judge court held that it did not have authority to re-determine the underlying liability question. State App. 77a-78a. The State does not contest this legal conclusion.

That is not to say that the State was precluded from proving that it had eliminated the constitutional violations: any such arguments were properly directed at the single judge district courts. The three-judge court invited the State, if it contended that the constitutional violations had been remedied, to bring that matter before the single judge district courts in an appropriate proceeding. Pretrial Conf. Tr. 28-29 (Nov. 10, 2008); *see also* 18 U.S.C. § 3626(b). The State still has not done so.

II. The Order Below Provides The Least Intrusive Means To Remedy The Constitutional Violations, And Is Narrowly Tailored.

1. The State's charge that the court "invad[ed] [] the State's managerial prerogatives" and violated fundamental principles of federalism because it "direct[ed] the prisoner release order at *all* prisoners in California" (J.S. 28) is plainly wrong. The lower court did not direct its order at any prisoners – it acted consistent with the procedures adopted by this Court in *Bounds v. Smith*, 430 U.S. 817, 832-833 (1977) and refined in *Lewis v. Casey*, 518 U.S. 343, 361-363 (1996), by deferring to the State to determine the method by which the population will be reduced, and hence which prisoners will be affected. State App. 255a-256a. As the lower court correctly found, this approach provides "the deference to state expertise required by the PLRA and *Lewis* and limits this court's intrusion into 'the minutiae of prison operations.'" State App. 175a (citations omitted). This Court directed the lower courts to employ this approach precisely because it allows the State to exercise "wide discretion within the bounds of constitutional requirements." *Lewis*, 518 U.S. at 363 (citation omitted).

The State benefitted from the deference and flexibility provided by the lower court, and it submitted a plan that would reduce the population of all prisoners, not just class members. State App. 312a, 339a. Accordingly, it can hardly claim that its

prerogatives have been infringed or that principles of federalism have been violated.[2]

2. The State next complains that the three-judge court exceeded its authority by "impos[ing] an inflexible population cap" and timeframe for implementing the cap. J.S. 26. But in the court below, the State argued that the three-judge court *must* impose a precise population cap and set the timeframe for implementing the cap, and that the court could not in its order defer to the State to recommend appropriate limits. Trial Tr. 2970:8-14, 2968:18-23. The court followed the State's suggestion, and set just such a cap. The State cannot now claim that what it invited was legal error.

The lower court specifically requested that the parties inform the court what an appropriate cap would be, and how long it would take to implement it. Trial Tr. 2857:17-21; 2858:22-2859:1. The State never provided any such information. Only plaintiffs submitted evidence and argument on this point. 1/28/09 Plfs' Corr. Proposed Findings of Fact at 172-178 (*Plata* Docket 2038).

Nor does the State have any basis for contesting the court's determination to cap the population at 137.5% of design capacity. The State does not argue that 137.5% is the *wrong* cap; its complaint is about the methods the lower court used to reach 137.5%. But the court's methods were sound.

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[2] Furthermore, an appropriate remedy for a systemwide violation caused by overcrowding could include reducing the overall prison population. *See* appellees' Joint Motion to Dismiss or Affirm in Case No. 09-553 at 20-21.

First, numerous current and former corrections administrators testified that even at 100% of design capacity, the prisons would face serious difficulty providing constitutionally adequate health care. State App. 176a-197a. State prisons were built to provide health care at 100% of design capacity, and must operate below that level to preserve space to transfer medically-needy prisoners to appropriate beds. State App. 176a-179a.

Nonetheless, the former Secretary of California's prison system testified that the maximum level of crowding at which the State could provide adequate health care is 130% of design capacity. Woodford Supp. Report ¶ 3. 130% is also the absolute maximum crowding level identified by a key State official in charge of prison facilities. State App. 180a. The former heads of state prison systems in Texas, Pennsylvania, Maine and Washington likewise testified that 130% is the maximum crowding level at which the State could provide constitutionally adequate health care. State App. 180a-181a.

In light of the evidence at trial, the three-judge court would have been well within its discretion to set the population cap at 130% of design capacity. Nonetheless, in an abundance of caution, and out of deference to the State, the court set a still more conservative cap of 137.5%. State App. 184a.

The State's quarrel is with the calculus by which the court *increased* the cap from the 130% level identified by all experts who testified about the subject. That the court acted conservatively, in order to preserve as much discretion as possible to the State, does not present a substantial question warranting this Court's review.

3. The State's claim that the lower court erred by failing to give adequate consideration to public safety is also meritless.

The PLRA requires that courts considering granting any prospective relief in prison cases "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A). The lower court did just that. It found that methods exist by which the State could reduce its prison population without adversely affecting public safety or the criminal justice system. State App. 185a-187a. Those methods include, among others, good time credits that shorten length of stay in prison, and diverting certain low-level, low-risk offenders away from prison. State App. 192a-216a. The State does not claim that these findings were erroneous, and indeed proposes to reduce the prison population using precisely these methods. 11/12/09 State Plan.

The State has already admitted that it can "safely reach a population of 137.5%" of design capacity, and the Governor has proposed a plan to the State legislature to do just that. State App. 317a; J.S. 11. The State does not deny that the Governor has recently declared that it could be done safely in two years. *See* Matthew Cate, *Prisons: It's Time to Reform and Reduce the Population, Capitol Weekly, August 13, 2009*, 10/8/09 Evenson Decl., Exh. B (*Plata* Docket 2258) (editorial by head of California prisons explaining Governor's plan to reduce prison population by 37,000 prisoners over two years). And the State concedes that the Governor would not propose any population reduction measures that are not safe. Trial Tr. 2984:7-2985:15.

Without acknowledging the findings made by the lower court – or its own admission about the safety of a gradual population reduction – the State posits that the lower court "candidly acknowledged that crime was likely to increase without substantial investment in 'evidence based, rehabilitative programming.'" J.S. 32. The opposite is true. State App. 185a-187a. The court found that "the state can comply with our order in a manner that will not adversely affect public safety." State App. 186a. The State does not claim that this, or any other finding, was in error.

The three-judge court found that though the population can be reduced without adversely impacting public safety, increasing rehabilitative programs–an idea espoused by the Governor, the State legislature, and all the local law enforcement intervenors–would "increase public safety over its current level." State App. 252a-253a. The State currently releases 10,000 prisoners every month without providing meaningful rehabilitation. State App. 128a-129a. Nevertheless, the court properly let the State decide whether to fund more rehabilitation programs. "Although California's prison population could be reduced without adopting or strengthening such local programs, the benefit to the State of investing in them would be considerable. Whether or not to make such an investment, however, is . . . a matter for state officials, not the court, to decide." State App. 235a; *see also* State App. 252a-253a (same).

III. The State's Jurisdiction Arguments Are Baseless, And This Court Has No Jurisdiction To Decide Them.

1. The State contends that the three-judge court did not have jurisdiction because the single judge *Plata* and *Coleman* courts erred when they found that the State had been given "a reasonable amount of time" to comply with their earlier, less intrusive orders. 18 U.S.C. § 3626(a)(3)(A)(ii). But any error by the single judges did not deprive the three-judge court of jurisdiction.

The three-judge court proceeding is not a separate action for which jurisdiction must be established anew, it is a remedial proceeding for the underlying *Plata* and *Coleman* cases. 18 U.S.C. § 3626(a)(3). The State does not dispute that the *Plata* and *Coleman* courts have jurisdiction. That being so, the three-judge court's jurisdiction is not in dispute.

The PLRA provides that if a court has previously entered an order for less intrusive relief, and "the defendant has had a reasonable amount of time to comply with the previous court orders," 18 U.S.C. § 3626(a)(3)(A), then a party seeking a prisoner release order can petition the district court to convene a three-judge court to consider a prisoner release order. 18 U.S.C. § 3626(a)(3)(C). These are merely procedural requirements, not jurisdictional mandates.

In this respect, the PLRA is very different from 28 U.S.C. § 2284(a), which provides that a three-judge court "shall be convened" in other types of actions. In cases brought pursuant to § 2284, the three-judge court considers the entire matter

presented, and the original single judge district court has no jurisdiction to consider the matter. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962).

In cases brought pursuant to the PLRA, the single judge district court has jurisdiction to consider all liability questions and all remedy questions save one (prisoner release order), and the only role of the three-judge court is to answer the narrow question whether a prisoner release order is an appropriate remedy. 18 U.S.C. § 3626(a), (a)(3).

It is undisputed that the single judge district courts followed the proper procedures in convening the three-judge court here. At issue, then, is whether the two single judge district courts each erred in their separate factual findings that the State had "a reasonable amount of time" to comply with the previous *Plata* and *Coleman* court orders. 18 U.S.C. § 3626(a)(3)(A)(ii).

That dispute, however, is a matter governed by this Court's certiorari jurisdiction, not its appellate jurisdiction. 28 U.S.C. § 1253 provides this Court with appellate jurisdiction only over "an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Factual determinations in the single judge district courts' decisions to convene the three-judge court do not fall within this definition. Those are not determinations "granting or denying" an injunction, and they are not "required by any Act of Congress to be heard and determined by a district court of three judges." To the contrary, the PLRA

specifically reserves those questions to single judge district courts. 18 U.S.C. § 3626(a)(3)(C), (D).

Accordingly, the State's disputes with the single judge district courts' findings related to convening the three-judge court are matters to be resolved by the court of appeals, not this Court. *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 99 (1974) (three-judge court's dismissal of matter for lack of standing is decision that could have been made by single judge district court, and therefore an appeal lies in the court of appeal, not the Supreme Court); *see also Dove v. Bumbers*, 497 F.2d 895, 896 ("a Court of Appeals has jurisdiction to determine whether a three-judge court was properly convened."); *Mayhue's Super Liquor Store, Inc. v. Meiklejohn*, 426 F.2d 142, 144-45 (5th Cir. 1970) (same).[3] "While issues short of the merits – such as justiceability, subject-matter jurisdiction, equitable jurisdiction, and abstention – are often of more than trivial consequence, that alone does not argue for [this Court's] reviewing them on direct appeal." *Gonzalez*, 419 U.S. at 99. Instead, the matter should be heard by the court of appeals in the first instance,

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[3] Underscoring this point, two years ago the State appealed the single judge orders convening the three judge court to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal as premature, noting that the orders "can be effectively reviewed following the entry of a final order by the three-judge district court." *Coleman v. Schwarzenegger*, No. 07-16361, 2007 WL 2669591 at *1 (9th Cir. Sept. 11, 2007). The State did not seek certiorari. *C.f. Idlewild*, 370 U.S. 713 (considering on certiorari appellate court's determination that single-judge court correctly denied application to convene three-judge court).

and "[d]iscretionary review in any case would remain available, informed by the mediating wisdom of a court of appeals." *Id.*[4]

2. Even if this Court had jurisdiction to consider the matter, the State's appeal fails to present a substantial question. The three-judge court conducted a lengthy trial in 2008, and issued its decision in 2009. Two years after its convening the court identified serious ongoing problems with medical and mental health care. *See, e.g.*, State App. 8a, 9a, 10a, 30a, 52a, etc. Indeed, the State has conceded in *Plata* that there are "current constitutional violations," *Plata v. Schwarzenegger*, No. 09-15864 (9th Cir. Sept. 16, 2009) (audio recording at 9:53-10:13), and it has never contested the *Coleman* court's findings of ongoing constitutional violations.

Thus, the State has had more than a reasonable amount of time to comply with the single judge courts' earlier orders, and the passage of time has made no difference. The State is still violating the constitutional rights of the plaintiff class members, and the courts need not wait even more time before ordering a remedy.

3. The State's argument that the *Coleman* court acted "prematurely" after issuing more than seventy-seven substantive orders over the course of fourteen years of post-judgment proceedings makes a mockery of the PLRA. J.S. 18, State App. 38a-39a.

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[4] Even if the question were one that this Court could resolve, the matter cannot be raised now, as this is an appeal from an interlocutory order.

It is undisputed that "defendants' mental health care delivery system has not come into compliance with the Eighth Amendment at any point since this action began [in 1990]." State App. 294a. Still, the *Coleman* court did not rush to convene the three-judge court. After plaintiffs filed the motion, the court stayed the matter and asked the Special Master for his opinion about the impact of crowding on his remedial efforts. He reported that crowding has resulted in shortages of programming space, beds for mentally ill inmates, and mental health staff, all of which result in the State's inability to meet even the basic mental health needs of prisoners, State App. 68a-69a, and that, "[o]ver the past 11-plus years, much has been achieved, and many of the achievements have succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair." Exh. P-35 at 16-17, State App. 41a.

The State contends that the lower court should have given it even more time to remedy mental health staffing shortages, develop alternate "bed plans," and address suicide prevention, as ordered by the court in 2006. J.S. 16-17. However, the passage of more time would have made no difference. Even at the time of trial in late 2008, there were still "staffing shortages 'at all clinical levels' of the CDCR's mental health care delivery system," including vacancies in the psychiatrist positions ranging from 30.6 percent to 54.1 percent. State App. 108a. Similarly, even though the *Coleman* court has issued more than a dozen orders aimed at eliminating the severe shortage of specialized beds for prisoners in need of higher levels of mental health treatment, State App. 43a-44a, the severe shortages persist today and "the

State has no current viable bed plan [and] is uncertain as to when [one] can be developed . . ." 3/5/09 Order 1:24-2:3 (*Coleman* Docket 3540); 9/24/09 Order at 3 (*Coleman* Docket 3686).

4. The State's arguments with respect to the *Plata* case are similarly unavailing.

In 2002, by stipulation, the *Plata* court entered an injunction designed to ensure minimally adequate medical care. 6/13/02 Stipulation and Order. However, "defendants proved incapable of or unwilling to provide the stipulated relief." State App. 14a.

In 2004, the *Plata* court, again by stipulation, entered another order requiring the State to remedy the unconstitutional conditions. 9/17/04 Stipulation and Order (*Plata* Docket 229). Again, the conditions were not remedied.

Over the intervening years, the district court employed myriad efforts to bring the State into compliance. State App. 17a-24a; 5/10/05 Order to Show Cause at 4-8 (*Plata* Docket 294); 10/3/05 Findings of Fact at 38-39 (*Plata* Docket 371).

It is true, as the State asserts, that plaintiffs *filed* their motion to convene the three-judge court seven months after the Receiver was appointed. What the State fails to mention is that the court did not *convene* the three-judge court for more than a year, and then only after the Governor had issued his emergency proclamation and the Receiver had stated that "[i]t will not be possible to raise access to, and quality of, medical care to constitutional levels with overpopulation at its current levels." Exh. P-55 at 1, 11/3/08 Order at 12 (*Plata* Docket 1757) (granting judicial notice).

The *Plata* court found that the conditions for convening a three-judge court had been met because "the Receiver will be unable to eliminate the constitutional deficiencies at issue in this case in a reasonable amount of time unless something is done to address the crowded conditions in California prisons," State App. 286a, and "'[t]he Court has given defendants every reasonable opportunity to bring its prison medical system up to constitutional standards, and it is beyond reasonable dispute that the State has failed.'" State App. 279a (citation omitted); State App. 281a-282a.

The *Plata* court was right on both counts. It is now three and a half years since the Receiver first took office, and the Receiver has still been unable to remedy the constitutional violations. Indeed, the State concedes that unconstitutional conditions remain, and that judicial oversight remains necessary. *Plata v. Schwarzenegger*, No. 09-15864 (9th Cir. Sept. 16, 2009) (audio recording at 9:53-10:13).

In an ironic twist, at the very same time that the State is arguing here that the district court should have given the Receiver more time to fix the violations, the State is also arguing in the Ninth Circuit Court of Appeals that the district court must terminate the Receivership and the Receiver's plans on the grounds that both are prohibited by the PLRA. *Plata v. Schwarzenegger*, No. 09-15864 (9th Cir. oral argument held Sept. 16, 2009). If the State were right that the PLRA prohibits receivers, it could not also be true that the PLRA requires a district court to provide a receiver time to implement his remedies before convening a three-judge court to consider a

prisoner release order. The positions are simply inconsistent.

IV. This Case Will Have Limited Impact Beyond California.

The State asserts that any summary affirmance by this Court will have precedential affect. But it is well recognized that "[t]he Court gives less deference to summary dispositions." *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 920 n*(1990); *see also Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979) (same); *see also Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90, 95 (1974) ("in the area of statutory three-judge court law the doctrine of *stare decisis* has historically been accorded considerably less than its usual weight").

Because the level of overcrowding in California is unprecedented, there are no serious legal issues in the case, no circuit splits, and the disputes between the parties are largely factual, a summary affirmance will have no significant impact beyond California.

On the other hand, a summary affirmance would protect the constitutional rights, as well as the lives and health, of the tens of thousands of plaintiff class members. For decades the State has dragged its heels and flouted the orders of the *Plata* and *Coleman* courts, and plaintiff class members have continued to suffer. As the lead defendant, Governor Schwarzenegger, stated:

> I don't blame the courts for stepping in to try to solve the health care crisis that we have, the overcrowding crisis that we have, because the fact of the matter is, for decades the state

> of California hasn't really taken it seriously. It hasn't really done something about it.

Exh. P-384, Trial Tr. 650-51.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in appellees' Motion to Dismiss or Affirm in Case No. 09-553, the appeal should be dismissed or the order below should be affirmed.

Respectfully submitted,

Michael Bien
Jane E. Kahn
Ernest Galvan
Amy Whelan
Lisa Ells
ROSEN, BIEN & GALVAN, LLP
315 Montgomery St., 10th Fl.
San Francisco, CA 94104

Donald Specter
Counsel of Record
Steve Fama
Alison Hardy
Sara Norman
Rebekah Evenson
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621

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APPENDIX

APPENDIX

Exh. P-1

10/04/2006

Prison Overcrowding State of Emergency Proclamation

PROCLAMATION
by the
Governor of the State of California

WHEREAS, the California Department of Corrections and Rehabilitation (CDCR) is required by California law to house inmates committed to state prison; and

WHEREAS, various trends and factors, including population increases, parole policies, sentencing laws, and recidivism rates have created circumstances in which the CDCR is now required to house a record number of inmates in the CDCR prison system, making the CDCR prison system the largest state correctional system in the United States, with a total inmate population currently at an all-time high of more than 170,000 inmates; and

WHEREAS, due to the record number of inmates currently housed in prison in California, all 33 CDCR prisons are now at or above maximum operational capacity, and 29 of the prisons are so overcrowded that the CDCR is required to house more than 15,000 inmates in conditions that pose substantial safety risks, namely, prison areas never designed or intended for inmate housing, including, but not limited to, common areas such as prison gymnasiums, dayrooms, and program rooms, with approximately 1,500 inmates sleeping in triple-bunks; and

WHEREAS, the current severe overcrowding in 29 CDCR prisons has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them, because:

With so many inmates housed in large common areas, there is an increased, substantial risk of violence, and greater difficulty controlling large inmate populations.

With large numbers of inmates housed together in triple-bunks, there is an increased, substantial risk for transmission of infectious illnesses.

The triple-bunks and tight quarters create line-of-sight problems for correctional officers by blocking views, creating an increased, substantial security risk.

WHEREAS, the current severe overcrowding in these 29 prisons has also overwhelmed the electrical systems and/or wastewater/sewer systems, because those systems are now often required to operate at or above the maximum intended capacity, resulting in an increased, substantial risk to the health and safety of CDCR staff, inmates, and the public, because:

Overloading the prison electrical systems has resulted in power failures and blackouts within the prisons, creating increased security threats. It has also damaged fuses and transformers.

Overloading the prison sewage and wastewater systems has resulted in the discharge of waste

beyond treatment capacity, resulting in thousands of gallons of sewage spills and environmental contamination.

And when the prisons "overdischarge" waste, bacteria can contaminate the drinking water supply, putting the public's health at an increased, substantial risk.

WHEREAS, overloading the prison sewage and water systems has resulted in increased, substantial risk of damage to state and privately owned property and has resulted in multiple fines, penalties and/or notices of violations to the CDCR related to wastewater/sewer system overloading such as groundwater contamination and environmental pollution; and

WHEREAS, overcrowding causes harm to people and property, leads to inmate unrest and misconduct, reduces or eliminates programs, and increases recidivism as shown within this state and in others; and

WHEREAS, in addition to all of the above, in the 29 prisons with severe overcrowding, the following circumstances exist:

Avenal State Prison has an operational housing capacity of 5,768 inmates, but it currently houses 7,422 inmates, with 1,654 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 64 incidents of assault/battery by inmates – 31 of them against CDCR staff – along with 15 riots/melees, and 27 weapon confiscations.

The California Correctional Center has an operational housing capacity of 5,724 inmates, but it currently houses 6,174 inmates, with 450 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 128 incidents of assault/battery by inmates – 16 of them against CDCR staff – along with 34 riots/melees, and 21 weapon confiscations.

The California Correctional Institution has an operational housing capacity of 4,931, but it currently houses 5,702 inmates, with 771 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 125 incidents of assault/battery by inmates – 79 of them against CDCR staff – along with 5 riots/melees, and 57 weapon confiscations.

Centinela State Prison has an operational housing capacity of 4,368, but it currently houses 4,956 inmates, with 588 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 141 incidents of assault/battery by inmates – 30 of them against CDCR staff – along with 10 riots/melees, and 151 weapon confiscations.

The California Institution for Men has an operational housing capacity of 5,372, but it currently houses 6,615 inmates, with 1,243 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 170 incidents of assault/battery by inmates – 57 of them against CDCR staff – along with 21 riots/melees, and 47 weapon confiscations.

The California Institution for Women has an operational housing capacity of 2,228, but it currently

houses 2,624 inmates, with 396 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 65 incidents of assault/battery by inmates – 26 of them against CDCR staff – and 6 weapon confiscations.

The California Men's Colony has an operational housing capacity of 6,294, but it currently houses 6,574 inmates, with 280 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 151 incidents of assault/battery by inmates – 33 of them against CDCR staff – along with 11 riots/melees, and 29 weapon confiscations.

The California State Prison at Corcoran has an operational housing capacity of 4,954, but it currently houses 5,317 inmates, with 363 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 147 incidents of assault/battery by inmates – 58 of them against CDCR staff – along with 5 riots/melees, and 111 weapon confiscations.

The California Rehabilitation Center has an operational housing capacity of 4,660, but it currently houses 4,856 inmates, with 196 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 65 incidents of assault/battery by inmates – 28 of them against CDCR staff – 9 riots/melees, and 34 weapon confiscations.

The Correctional Training Facility has an operational housing capacity of 6,157, but it currently houses 7,027 inmates, with 870 inmates housed in areas designed for other purposes. At the same time,

in the last year, there were 85 incidents of assault/battery by inmates – 26 of them against CDCR staff – along with 9 riots/melees, and 27 weapon confiscations.

Chuckawalla Valley State Prison has an operational housing capacity of 3,443, but it currently houses 4,292 inmates, with 849 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 50 incidents of assault/battery by inmates – 11 of them against CDCR staff – along with 5 riots/melees, and 21 weapon confiscations.

Deuel Vocational Institution has an operational housing capacity of 3,115, but it currently houses 3,911 inmates, with 796 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 114 incidents of assault/battery by inmates – 54 of them against CDCR staff – along with 7 riots/melees, and 37 weapon confiscations.

High Desert State Prison has an operational housing capacity of 4,346, but it currently houses 4,706 inmates, with 360 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 351 incidents of assault/battery by inmates – 44 of them against CDCR staff – along with 6 riots/melees, and 289 weapon confiscations.

Ironwood State Prison has an operational housing capacity of 4,185, but it currently houses 4,665 inmates, with 480 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 96 incidents of assault/battery

by inmates – 19 of them against CDCR staff – along with 14 riots/melees, and 52 weapon confiscations.

Kern Valley State Prison has an operational housing capacity of 4,566, but it currently houses 4,686 inmates, with 120 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 146 incidents of assault/battery by inmates – 60 of them against CDCR staff – along with 10 riots/melees, and 46 weapon confiscations.

The California State Prison at Los Angeles has an operational housing capacity of 4,230, but it currently houses 4,698 inmates, with 468 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 211 incidents of assault/battery by inmates – 123 of them against CDCR staff – along with 4 riots/melees, and 101 weapon confiscations.

Mule Creek State Prison has an operational housing capacity of 3,197, but it currently houses 3,929 inmates, with 732 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 65 incidents of assault/battery by inmates – 35 of them against CDCR staff – along with 1 riot/melee, and 28 weapon confiscations.

North Kern State Prison has an operational housing capacity of 5,189, but it currently houses 5,365 inmates, with 176 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 135 incidents of assault/battery by inmates – 43 of them against CDCR staff – along with 16 riots/melees, and 70 weapon confiscations.

Pelican Bay State Prison has an operational housing capacity of 3,444, but it currently houses 3,604 inmates, with 160 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 256 incidents of assault/battery by inmates – 88 of them against CDCR staff – along with 9 riots/melees, and 106 weapon confiscations.

Pleasant Valley State Prison has an operational housing capacity of 4,368, but it currently houses 5,112 inmates, with 744 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 205 incidents of assault/battery by inmates – 59 of them against CDCR staff – along with 12 riots/melees, and 26 weapon confiscations.

The Richard J. Donovan Correctional Facility has an operational housing capacity of 4,120, but it currently houses 4,720 inmates, with 600 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 244 incidents of assault/battery by inmates – 118 of them against CDCR staff – along with 11 riots/melees, and 96 weapon confiscations.

The California State Prison at Sacramento has an operational housing capacity of 2,973, but it currently houses 3,213 inmates, with 240 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 264 incidents of assault/battery by inmates – 159 of them against CDCR staff – along with 5 riots/melees, and 118 weapon confiscations.

The California Substance Abuse Treatment Facility and State Prison at Corcoran has an operational housing capacity of 6,360, but it currently houses 7,593 inmates, with 1,233 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 120 incidents of assault/battery by inmates – 53 of them against CDCR staff – along with 20 riots/melees, and 124 weapon confiscations.

The Sierra Conservation Center has an operational housing capacity of 5,657, but it currently houses 6,107 inmates, with 450 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 61 incidents of assault/battery by inmates – 18 of them against CDCR staff – along with 19 riots/melees, and 50 weapon confiscations.

The California State Prison at Solano has an operational housing capacity of 5,070, but it currently houses 5,858 inmates, with 788 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 60 incidents of assault/battery by inmates – 26 of them against CDCR staff – along with 4 riots/melees, and 114 weapon confiscations.

San Quentin State Prison has an operational housing capacity of 4,933, but it currently houses 5,183 inmates, with 287 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 262 incidents of assault/battery by inmates – 123 of them against CDCR staff – along with 15 riots/melees, and 118 weapon confiscations.

Salinas Valley State Prison has an operational housing capacity of 4,200, but it currently houses 4,680 inmates, with 480 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 181 incidents of assault/battery by inmates – 82 of them against CDCR staff – along with 7 riots/melees, and 91 weapon confiscations.

Valley State Prison for Women has an operational housing capacity of 3,902, but it currently houses 3,958 inmates, with 56 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 125 incidents of assault/battery by inmates – 75 of them against CDCR staff – and 15 weapon confiscations.

Wasco State Prison has an operational housing capacity of 5,838, but it currently houses 6,098 inmates, with 260 inmates housed in areas designed for other purposes. At the same time, in the last year, there were 226 incidents of assault/battery by inmates – 97 of them against CDCR staff – along with 32 riots/melees, and 82 weapon confiscations.

WHEREAS, some of these 29 severely overcrowded prisons may even be housing more inmates, because the inmate population continually fluctuates among the CDCR prisons; and

WHEREAS, in addition to the 1,671 incidents of violence perpetrated in these 29 severely overcrowded prisons by inmates against CDCR staff last year, and the 2,642 incidents of violence perpetrated in these prisons on inmates by other inmates in the last year, the suicide rate in these 29 prisons is approaching an average of one per week; and

WHEREAS, the federal court in the *Coleman* case found mental-health care in CDCR prisons to be below federal constitutional standards due in part to the lack of appropriate beds and space; and

WHEREAS, the use of common areas for inmate housing has severely modified or eliminated certain inmate programs in the 29 prisons with severe overcrowding; and

WHEREAS, the severe overcrowding has also substantially limited or restricted inmate movement, causing significantly reduced inmate attendance in academic, vocational, and rehabilitation programs; and

WHEREAS, overcrowded prisons in other states have experienced some of the deadliest prison riots in American history, including:

In 1971, the nation's deadliest prison riot occurred in Attica, New York, resulting in the death of 43 people. On the day of this riot, the prison – which was built for 1600 – housed approximately 2,300 inmates.

In 1981, a riot occurred in the New Mexico State Penitentiary. More than 30 inmates were killed, more than 100 people were injured, and 12 officers were taken hostage, some of whom were beaten, sexually assaulted, and/or raped. On the day of this riot, the prison – which was built for 900 – housed approximately 1,136 inmates.

In 1993, a riot occurred in Lucasville, Ohio. One officer was murdered, four officers were seriously injured, and nine inmates were killed. On

the day of this riot, the prison – which was built for 1600 – housed approximately 2,300 inmates.

WHEREAS, I believe immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding; and

WHEREAS, because of the housing shortage in CDCR prisons, the CDCR has current contracts with four California counties to house 2,352 additional state inmates in local adult jails, but this creates the following overcrowding problem in the county jails:

According to a report by the California State Sheriffs' Association in June 2006, adult jails recently averaged a daily population of approximately 80,000 inmates. On a typical day, the county jails lacked space for more than 4,900 inmates across the state.

Based on the same report, 20 of California's 58 counties have court-imposed population caps resulting from litigation brought by or on behalf of inmates in crowded jails and another 12 counties have self-imposed caps.

Most of California's jail population consists of felony inmates, but when county jails are full, someone in custody must be released before a new inmate can be admitted.

The 2006 Sheriffs' Association report states that last year, 233,388 individuals statewide avoided incarceration or were released early into local communities because of the lack of jail space.

WHEREAS, overcrowding conditions are projected to get even worse in the coming year, to the point that the CDCR expects to run out of all common area space to house prisoners in mid-2007, and will be unable to receive any new inmates; and

WHEREAS, in January 2006, I proposed $6 billion in the Strategic Growth Plan to help manage inmate population at all levels of government by increasing the number of available local jail beds and providing for two new prisons and space for 83,000 prisoners to address California's current and future incarceration needs; and

WHEREAS, the California Legislature failed to act upon this proposal; and

WHEREAS, in March 2006, a proposal was submitted as part of my 2006-07 budget to enable the CDCR to contract for a total of 8,500 beds in community correctional facilities within the state; and

WHEREAS, the California Legislature denied this proposal; and

WHEREAS, on June 26, 2006, I issued a proclamation calling the Legislature into special session because I believed urgent action was needed to address this severe problem in California's prisons, and I wanted to give the Legislature a further opportunity to address this crisis; and

WHEREAS, the CDCR submitted detailed proposals to the Legislature to address the immediate and longer-term needs of the prison

system in an effort resolve the overcrowding crisis; and

WHEREAS, the California Legislature failed to adopt the proposals submitted by the CDCR, and also failed to adopt any proposals of its own; and

WHEREAS, in response, my office directed the CDCR to conduct a survey of certain inmates in California's general population to determine how many might voluntarily transfer to out-of-state correctional facilities; and

WHEREAS, the CDCR reports that more than 19,000 inmates expressed interest in voluntarily transferring to a correctional facility outside of California; and

WHEREAS, the overcrowding crisis gets worse with each passing day, creating an emergency in the California prison system.

NOW, THEREFORE, I, ARNOLD SCHWARZENEGGER, Governor of the State of California, in light of the aforementioned, find that conditions of extreme peril to the safety of persons and property exist in the 29 CDCR prisons identified above, due to severe overcrowding, and that the magnitude of the circumstances exceeds the capabilities of the services, personnel, equipment, and facilities of any geographical area in this state. Additionally, the counties within the state are harmed by this situation, as the inability to appropriately house inmates directly impacts local jail capacity and the early release of felons. This crisis spans the eastern, western, northern, and southern parts of the state and compromises the

public's safety, and I find that local authority is inadequate to cope with the emergency. Accordingly, under the authority of the California Emergency Services Act, set forth at Title 2, Division 1, Chapter 7 of the California Government Code, commencing with section 8550, I hereby proclaim that a State of Emergency exists within the State of California's prison system.

Pursuant to this proclamation:

I. The CDCR shall, consistent with state law and as deemed appropriate by the CDCR Secretary for the sole purpose of immediately mitigating the severe overcrowding in these 29 prisons and the resulting impacts within California, immediately contract for out-of-state correctional facilities to effectuate voluntary transfers of California prison inmates to facilities outside of this state for incarceration consisting of constitutionally adequate housing, care, and programming.

II. The CDCR Secretary shall, after exhausting all possibilities for voluntary transfers of inmates, and in compliance with the Interstate Corrections Compact and the Western Interstate Corrections Compact, and as he deems necessary and appropriate to mitigate this emergency, effectuate involuntary transfers of California prison inmates, based on criteria set forth below, to institutions in other states and those of the federal government for incarceration consisting of constitutionally adequate housing, care, and programming. In such instance, because strict compliance with California Penal Code sections 11191 and 2911 would prevent, hinder, or delay the mitigation of the severe overcrowding in

these prisons, applicable provisions of these statutes are suspended to the extent necessary to enable the CDCR to transfer adult inmates, sentenced under California law, to institutions in other states and those of the federal government without consent. This suspension is limited to the scope and duration of this emergency.

A. The CDCR Secretary shall prioritize for involuntary transfer the inmates who meet the following criteria:

1. Inmates who: (a) have been previously deported by the federal government and are criminal aliens subject to immediate deportation; or (b) have committed an aggravated felony as defined by federal statute and are subject to deportation.

2. Inmates who are paroling outside of California.

3. Inmates who have limited or no family or supportive ties in California based on visitation records and/or other information deemed relevant and appropriate by the CDCR Secretary.

4. Inmates who have family or supportive ties in a transfer state.

5. Other inmates as deemed appropriate by the CDCR Secretary.

B. No person under commitment to the Division of Juvenile Justice may be considered for such transfer.

III. The CDCR Secretary shall, before selecting any inmate for transfer who has individual medical and/or mental-health needs, consult with the

court-appointed Receiver of the CDCR medical system and/or the court-assigned Special Master in the *Coleman* mental-health case, depending on the healthcare needs of the inmate, to determine whether a transfer would be appropriate.

IV. The CDCR Secretary shall, before effectuating any inmate transfer, carefully and thoroughly evaluate all appropriate factors, including, but not limited to, the cost-effectiveness of any such transfer and whether an inmate selected for transfer has any pending appeals or hearings that may be impacted by such transfer.

V. The CDCR shall, as deemed appropriate by the CDCR Secretary, contract for facility space, inmate transportation, inmate screening, the services of qualified personnel, and/or for the supplies, materials, equipment, and other services needed to immediately mitigate the severe overcrowding and the resulting impacts within California. Because strict compliance with the provisions of the Government Code and the Public Contract Code applicable to state contracts would prevent, hinder, or delay the mitigation of the severe overcrowding in these prisons, applicable provisions of these statutes, including, but not limited to, advertising and competitive bidding requirements, are suspended to the extent necessary to enable the CDCR to enter into such contracts as expeditiously as possible. This suspension is limited to the scope and duration of this emergency.

I FURTHER DIRECT that as soon as hereafter possible, this proclamation be filed in the

Office of the Secretary of State and that widespread publicity and notice be given of this proclamation.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 4th day of October 2006.

ARNOLD SCHWARZENEGGER
Governor of California

ATTEST:

BRUCE McPHERSON
Secretary of State

Case No. CIV S-90-0520 LKK JFM (E.D. Cal)
C01-1351 TEH (N.D. Cal.)

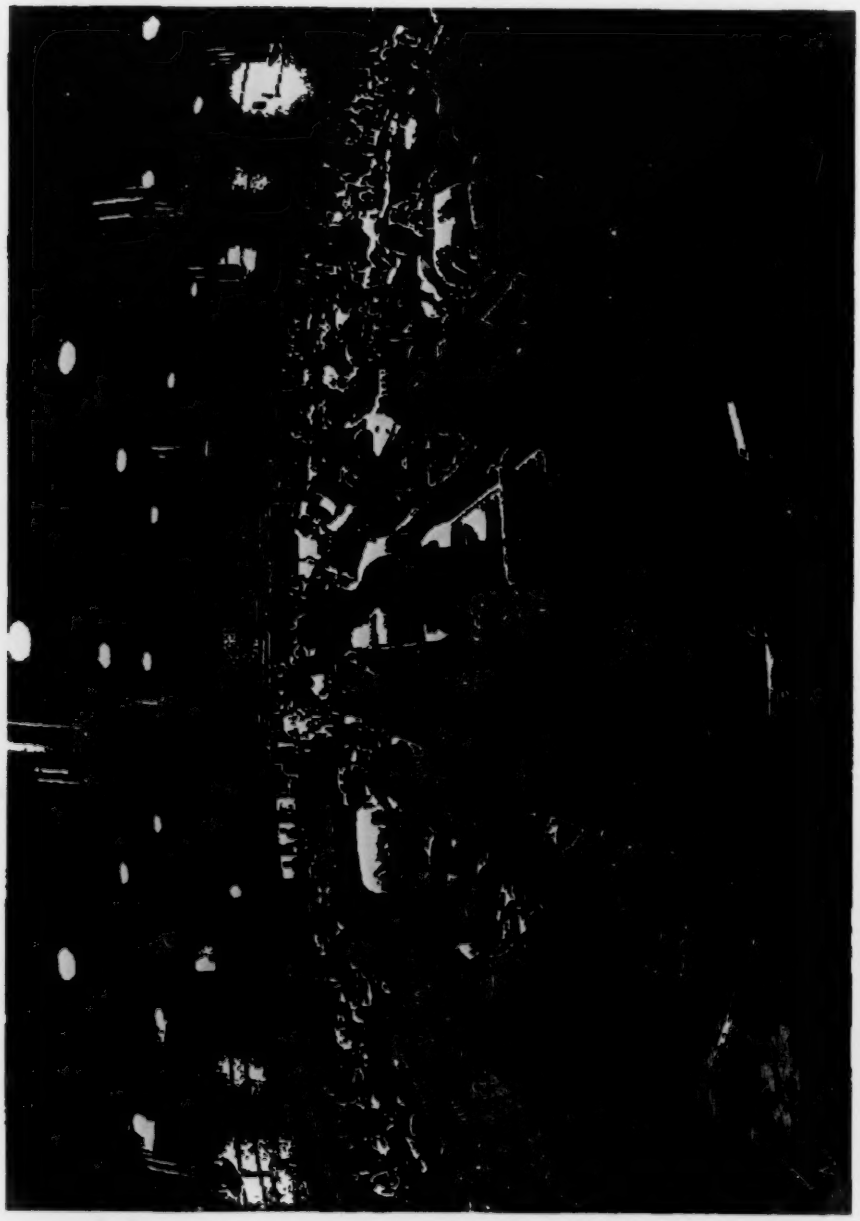
Exh. P-342

BEST AVAILABLE COPY

http://www.cdcr.ca.gov/News/images/overcrowding/CIM5.jpg

August 7, 2006

Exh. P-343



21a

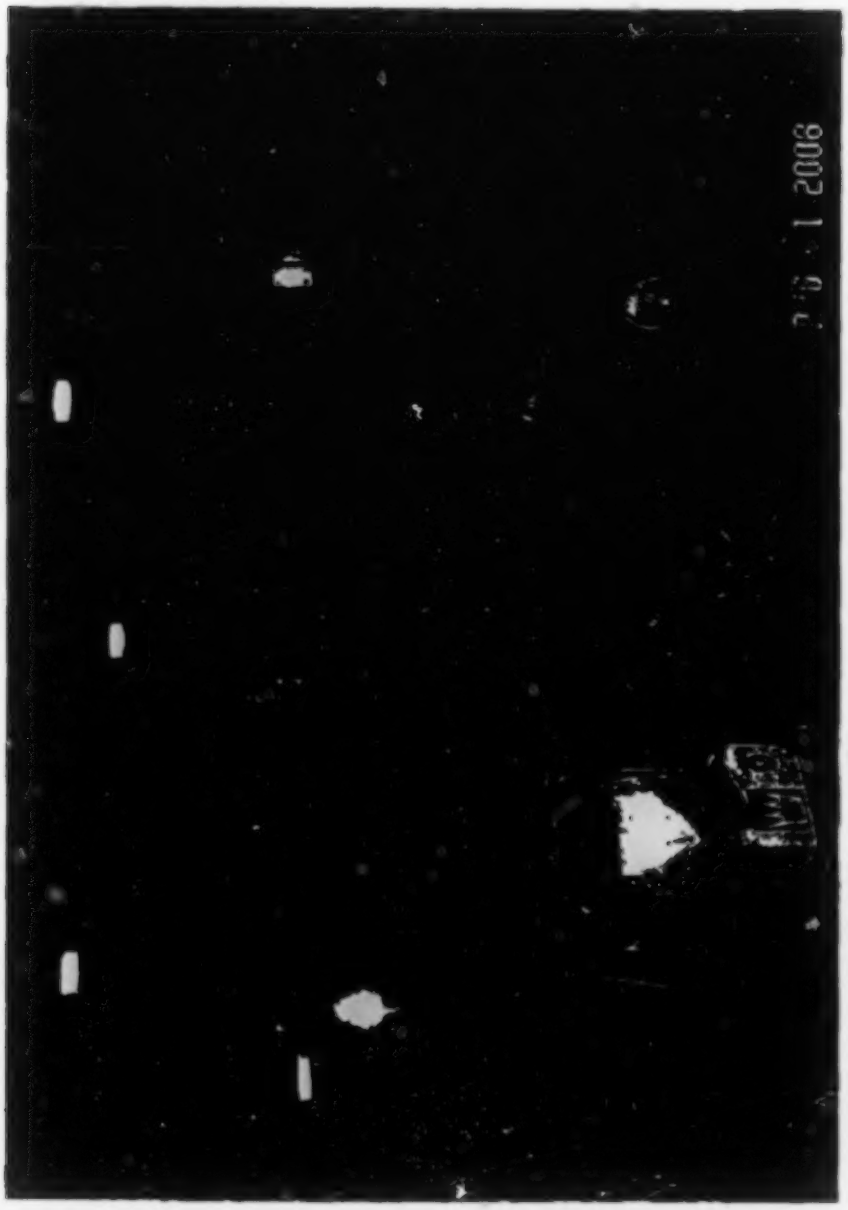
MCSP-5B
A-yard Gym Dorm
August 1, 2008

Exh. P-339-05B

22a

MCSP-6B
A-yard Gym Dorm
August 1, 2008

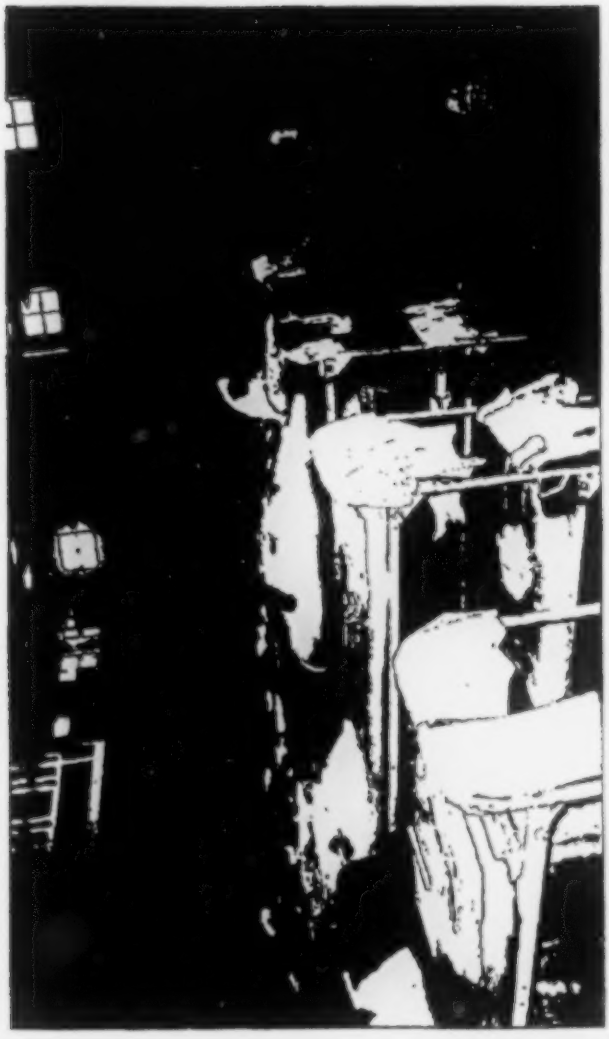
Exh. P-339-06B



23a

NKSP-13B
Facility A Gym
July 31, 2008

Exh. P-340-13B



Supreme Court, U.S.
FILED
JAN - 5 2010
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No. 09-416

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

Appeal from the United States District Courts for the Eastern District of California and the Northern District of California

SUPPLEMENTAL BRIEF OF APPELLANTS

EDMUND G. BROWN JR.
ATTORNEY GENERAL OF CALIFORNIA
JAMES M. HUMES
CHIEF DEPUTY ATTORNEY GENERAL
MANUEL M. MEDEIROS
STATE SOLICITOR GENERAL
GORDON BURNS
DEPUTY SOLICITOR GENERAL
JONATHAN L. WOLFF
ROCHELLE C. EAST
SENIOR ASSISTANT ATTORNEYS GENERAL
KYLE A. LEWIS
DANIELLE F. O'BANNON
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JERROLD C. SCHAEFER
PAUL B. MELLO
S. ANNE JOHNSON
SAMANTHA D. WOLFF
RENJU P. JACOB
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants
*Counsel of Record

January 5, 2010

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SUPPLEMENTAL BRIEF

The State submits this Supplemental Brief to apprise the Court of the January 4, 2010 order issued by the single-judge court in *Coleman* v. *Schwarzenegger*, No. 2:90-cv-00520-LKK-JFM (E.D. Cal. Jan. 4, 2010) (Docket No. 3761) (Reproduced as Addendum (Add.1-7), hereto). In rejecting a particular bed plan proposal as non-compliant with the mandate of the three-judge court's order under review, the *Coleman* court's order undermines appellees' arguments for dismissal and summary affirmance. See Add.2-3.

Specifically, appellees argue that the appeal should be dismissed because the three-judge court's order under review is insufficiently final for appellate review. See Mot. 8-10. And in favor of summary affirmance, they assert that the three-judge court's order accords the State "deference and flexibility" in its efforts to implement a population cap of 137.5% of design capacity. *Id.* at 24 (arguing that the order is not "direct[ed] . . . at any prisoners" and "allows the State to exercise 'wide discretion'"). The *Coleman* court's subsequent order, however, demonstrates that the three-judge court's order is a "prisoner release order" that presently has a binding effect, and that the 137.5% population cap is categorical and unbending even with respect to subsets of the prison population.

For a particular facility at which *Coleman* class members would be housed (the Stark enhanced outpatient program (EOP)), the State proposed a bed plan that would house inmates at 141% of design capacity. See Add.3. Judge Karlton rejected that proposal, stating:

> Defendants report that they "expect[] to double cell up to 141% capacity" in the EOP program at Stark. The three judge court *has ordered* defendants to "reduce the population of the CDCR's adult institutions to 137.5% of their combined design capacity" as a necessary prerequisite to the provision of constitutionally adequate medical and mental health care. *See* Opinion and Order filed Aug. 4, 2009. *This court will not approve the Stark EOP conversion project as long as the project calls for a projected population in excess of 137.5% of the facility's design capacity.*

Id. (emphases added and first internal citation omitted); see also *id.* (requiring that the State file an amended proposal within 45 days).

It is plain that Judge Karlton—unlike appellees—believes that the three-judge court already ordered a population reduction, *i.e.*, issued a "prisoner release order," 18 U.S.C. § 3626(g)(4). Moreover, it is clear that the *Coleman* court views the population cap imposed by the three-judge court as equally binding on the population of particular facilities as it is on the overall population, thus depriving the State of "flexibility," contrary to appellees' assertion. Compare Add.2-3, with Mot. 24 (asserting that the three-judge court order "deferr[ed] to the State to determine the method by which the population will be reduced"), J.S. App. 184a ("requir[ing] a reduction in the population of California's adult prison institutions to only 137.5% of their *combined* design capacity") (emphasis added), and *id.* at 255a (same).

Judge Karlton's order therefore confirms that this Court should note probable jurisdiction and undertake plenary review of the three-judge court's prisoner release order now.

CONCLUSION

The Court should note probable jurisdiction and deny appellees' motion for summary affirmance.

Respectfully submitted,

EDMUND G. BROWN JR.
ATTORNEY GENERAL OF CALIFORNIA
JAMES M. HUMES
CHIEF DEPUTY ATTORNEY GENERAL
MANUEL M. MEDEIROS
STATE SOLICITOR GENERAL
GORDON BURNS
DEPUTY SOLICITOR GENERAL
JONATHAN L. WOLFF
ROCHELLE C. EAST
SENIOR ASSISTANT ATTORNEYS GENERAL
KYLE A. LEWIS
DANIELLE F. O'BANNON
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JERROLD C. SCHAEFER
PAUL B. MELLO
S. ANNE JOHNSON
SAMANTHA D. WOLFF
RENJU P. JACOB
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants

*Counsel of Record

January 5, 2010

ADDENDUM

ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-90-0520 LKK JFM P

RALPH COLEMAN, et al.,

Plaintiffs,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

ORDER

Following a hearing on September 22, 2009, defendants were directed to file within forty-five days a detailed long-range bed plan, including activation schedules. *See* Sept. 24, 2009 Order, at 3. On November 6, 2009, defendants filed a long-range bed plan. On November 30, 2009, plaintiffs filed a response to defendants' plan and a request for evidentiary hearing on certain aspects of the plan. On December 11, 2009, defendants filed a response to plaintiffs' response, and on December 18, 2009, plaintiffs filed a reply and a renewed request for evidentiary hearing. The court has reviewed all of the papers filed by the parties, and has consulted with the special master.

Several areas of defendants' plan are not in dispute and will be approved by the court. Three areas of dispute require resolution. First, pursuant to the

court's September 24, 2009 order, all projects in the long-range plan are to be "fully staffed and activated by the 2013 target date" previously established by defendants. Sept. 24, 2009 Order, at 3. The activation schedules for three of the projects in the long-range plan, the Consolidated Care Center (CCC)[1], that part of the Stark conversion project that plans for additional enhanced outpatient program (EOP) beds for both general population (GP) and administrative segregation unit (ASU) inmates (hereafter referred to as the Stark EOP conversion project), and the DeWitt conversion project, reflect "activation" dates in 2013 or 2014, with patient admissions not completed at any of these sites until 2014. For the reasons set forth *infra*, the court will not approve the Stark EOP conversion project at this time. The special master reports that the mental health crisis bed project proposed for Stark is adequate and recommends its approval. That will be the order of the court. The CCC and the DeWitt conversion project will be approved subject to submission within thirty days of new activation schedules that reflect patient admissions completed to full occupancy for each of these projects by 2013.[2]

With respect to the Stark EOP conversion project, the papers before the court give rise to a concern that

---

[1] Defendants also refer to this facility as the Consolidated Care Facility (CCF). *See* Cover Sheet to Exhibit # 1 to defendants' Long-Range Mental Health Bed Plan.

[2] In their December 11, 2009 response, defendants represent that on December 7, 2009, the California Department of Finance authorized the California Department of Corrections and Rehabilitation to use a procurement process for the CCC that will enable defendants to complete patient admissions to the CCC by December 24, 2013. Defendants' Response, filed December 11, 2009, at 5.

this project may not be sufficient to meet the needs of the plaintiff class. The special master reports that this project will require either an increase in the amount of out of cell time for class members housed in that program, or reduction in the number of admissions, or some combination of the two. Defendants report that they "expect[] to double cell up to 141% capacity" in the EOP program at Stark. Declaration of Deborah Hysen in Support of Defendants' Responses to Plaintiffs' Response to Defendants' Long-Range Mental Health Bed Plan and Request for Evidentiary Hearing, filed December 11, 2009, at ¶ 11. The three judge court has ordered defendants to "reduce the population of the CDCR's adult institutions to 137.5% of their combined design capacity" as a necessary prerequisite to the provision of constitutionally adequate medical and mental health care. *See* Opinion and Order filed Aug. 4, 2009. This court will not approve the Stark EOP conversion project as long as the project calls for a projected population in excess of 137.5% of the facility's design capacity. Defendants will be directed to file, within forty-five days, an amended proposal for the Stark EOP conversion project that limits the population accordingly and that meets the concerns for this project identified by the special master.

Finally, defendants have failed to provide a detailed plan to meet the identified need for the female EOP population. Defendants' plan is described generally as a plan to convert existing inmate housing to EOP beds, and defendants represent that they are "currently working with the *Plata* Receiver on a health care improvement program at the three women's institutions to determine how best to meet" the needs of this female inmate population. Defendants also indicate that they anticipate that "any

parole, sentencing, and/or credit reforms, and the Three-Judge Court's prisoner release order, will significantly impact the female population." Defendants' Long-Range Plan, filed Nov. 6, 2009, at 10. The court will consider proposed revisions to the long-range plan should reductions in the inmate population warrant such consideration. Until the population is reduced, however, defendants will be required to comply with this court's orders concerning long-range planning. For that reason, defendants will be directed to file, within forty-five days, a detailed plan with activation schedules to meet the long-range bed needs of female EOP inmates identified in the Navigant 2009 spring population projections.

Defendants include in their long-range bed plan a request for approval of their plan to replace two court-ordered projects, the Salinas Valley State Prison (SVSP) 72-Bed EOP-ASU project and the SVSP 96-Bed EOP-GP Treatment and Office Space and Housing Unit Conversion Project, with one project identified as the SVSP 300 EOP-GP Treatment and Office Space A-Quad Project. Defendants' request will be granted.

Finally, the special master reports that the parties have agreed that defendants should not be required to describe departures from timeframes, as required by paragraph 2 of the court's June 18, 2009 order, or to report impediments to timely completion of a project, as required by paragraph 6 of the court's September 24, 2009 order, unless a departure or an impediment will delay completion of a project by more than thirty days. That interpretation is hereby approved for both the June 18, 2009 order and the September 24, 2009 order, and incorporated in the requirements of this order, *infra*.

In accordance with the above, IT IS HEREBY ORDERED that:

1. All projects in defendants' long-range plan, including the mental health crisis bed project at Stark, are approved with the following exceptions:

a. Defendants' proposed Consolidated Care Center is approved subject to submission within thirty days of a new activation schedule for this project that reflects patient admissions completed to full occupancy by 2013.

b. Defendants' proposed DeWitt conversion project is approved subject to submission within thirty days of a new activation schedule for this project that reflects patient admissions completed to full occupancy by 2013.

c. Defendants' proposed Stark EOP conversion project is not approved. Within forty-five days from the date of this order, defendants shall file an amended proposal for the Stark EOP conversion project that limits the population for that facility to no more 137.5% of the facility's design capacity and that meets the concerns identified by the special master.

d. Defendants have not adequately described their plan to meet the projected needs of the female EOP population. Within forty-five days from the date of this order defendants shall file a detailed plan with activation schedules to meet the long-range bed needs of female EOP inmates identified in the Navigant 2009 spring population projections.

2. Beginning on March 1, 2010, defendants shall report to the special master on a monthly basis all action taken on each project and whether each project remains on schedule or has been or can be acceler-

ated. Defendants' report shall be in the form of updates to the activation schedules for these projects. For any project that has departed from the promised timeframes defendants shall describe with specificity the reason or reasons for the departure and shall identify individuals or agencies whose acts or failures to act contributed to the departure. These projects shall be reviewed quarterly in conjunction with the court-ordered projects approved by this court on June 18, 2009.

3. Defendants are not required to describe departures from timeframes, as required by paragraph 2 of the court's June 18, 2009 order and paragraph 2 of this order, or to report impediments to timely completion of a project, as required by paragraph 6 of the court's September 24, 2009 order, unless a departure or an impediment will delay completion of a project by more than thirty days.

4. Defendants' request to replace the two court-ordered projects, the SVSP 72-Bed EOP-ASU project and the SVSP 96-Bed EOP-GP Treatment and Office Space and Housing Unit Conversion Project, with one project identified as the SVSP 300 EOP-GP Treatment and Office Space A-Quad Project is granted. The provisions of this court's June 18, 2009 order that governed the replaced projects shall apply in full to the new project.

5. Plaintiffs' request for evidentiary hearing is denied.

DATED: January 4, 2010

/s/LAWRENCE K. KARLTON

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
JAN 8 - 2010
OFFICE OF THE CLERK

No. 09-416

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et. al.*,

Appellants,

v.

MARCIANO *PLATA* AND RALPH *COLEMAN*, *et. al.*,

Appellees.

Appeal from the United States District Courts
For the Eastern District of California and
The Northern District of California

SUPPLEMENTAL BRIEF OF APPELLEES

Michael Bien
Jane E. Kahn
Ernest Galvan
Amy Whelan
Lisa Ells
ROSEN, BIEN & GALVAN, LLP
315 Montgomery St., 10th Fl.
San Francisco, CA 94104
Counsel for Coleman Appellees

Donald Specter
Counsel of Record
Steve Fama
Alison Hardy
Sara Norman
Rebekah Evenson
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621
Counsel for Coleman and Plata Appellees

January 8, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C 20002

On January 5, 2010, the State submitted a Supplemental Brief to this Court concerning an order issued by the single-judge district court in *Coleman v. Schwarzenegger*, No. 2:90-cv-00520-L-JFM (E.D. Cal. Jan. 4, 2010) (Docket No. 3761).

The State suggests that the single-judge court's recent order somehow buttresses the State's contention that the three-judge court's August 4, 2009 preliminary order requiring the State to submit a plan is an appealable final order. However, it should be obvious that nothing an individual member of the three-judge court does as a single judge in one of the underlying cases can change the nature of the order issued by the three-judge court. And it is clear that the three-judge court views its August 4, 2009 order as a preliminary order to be followed by a final and appealable prison release order. *See, e.g.*, Order Denying Stay, J.S. App. 308a; *see also* Appellees' Motion to Dismiss 8-10. That reality is all that matters for purposes of the proper disposition of the State's appeal, and the proper disposition remains dismissal or summary affirmance.

Nonetheless, the State provides a misleading and overly simplistic picture of the *Coleman* court's recent order. The State erroneously suggests that the *Coleman* court's refusal to approve a plan that involves unsafe crowding at one planned specialized health care facility for mentally ill prisoners (the Stark mental health facility) is evidence that the court is applying an across-the-board cap on the prison population. But the court's ruling with respect to the Stark facility is based upon the special master's concerns about the plans for that specific facility. State's Supp. Brief, Add. 2-3. The State

submitted plans to house mentally-ill prisoners at the Stark facility starting in 2013. The special master identified numerous problems with the Stark proposal, and the court took note of the concern that the Stark facility as proposed would "not be sufficient to meet the needs of the plaintiff class." *Id.*

At the same time as it rejected the defective Stark plan, the *Coleman* court approved, with minor exceptions, every other construction project that the State proposed to address the substantial and conceded unmet need for specialized mental health care beds. State's Supp. Brief, Add. 5. The court did so without imposing capacity limits on any of the approved facilities.

Nor has the *Coleman* court imposed a population cap on any of the numerous other facilities it has approved since the three-judge court's August 4, 2009 Order. Thus, every prison but one in California remains crowded at well above 137.5% of capacity, and neither the *Coleman* court nor any other court has required the State to commence reducing the population of those prisons.

The State's assertions that the three-judge court "already ordered a population reduction" and that "the *Coleman* court views the population cap imposed by the three-judge court as equally binding on the population of particular facilities as it is on the overall population" are simply without merit. State's Supp. Brief 2. The single-judge order in the *Coleman* case does not provide grounds for noting probable jurisdiction over the State's appeal, and the appeal should be dismissed or the order below summarily affirmed.

Respectfully submitted,

Michael Bien
Jane E. Kahn
Ernest Galvan
Amy Whelan
Lisa Ells
ROSEN, BIEN & GALVAN, LLP
315 Montgomery St., 10th Fl.
San Francisco, CA 94104

Donald Specter
Counsel of Record
Steve Fama
Alison Hardy
Sara Norman
Rebekah Evenson
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621

January 8, 2010

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SECOND SUPPLEMENTAL BRIEF OF APPELLANTS

EDMUND G. BROWN JR.
ATTORNEY GENERAL OF CALIFORNIA
JAMES M. HUMES
CHIEF DEPUTY ATTORNEY GENERAL
MANUEL M. MEDEIROS
STATE SOLICITOR GENERAL
GORDON BURNS
DEPUTY SOLICITOR GENERAL
JONATHAN L. WOLFF
ROCHELLE C. EAST
SENIOR ASSISTANT ATTORNEYS GENERAL
KYLE A. LEWIS
DANIELLE F. O'BANNON
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JERROLD C. SCHAEFER
PAUL B. MELLO
S. ANNE JOHNSON
SAMANTHA D. WOLFF
RENJU P. JACOB
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants
*Counsel of Record

January 14, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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SECOND SUPPLEMENTAL BRIEF

On Tuesday, the three-judge court issued an *Order to Reduce Prison Population* that demonstrates beyond doubt that the issues on appeal are ripe for review. *Coleman* v. *Schwarzenegger/Plata* v. *Schwarzenegger*, Nos. 2:90-cv-00520-LKK-JFM-P et al. (E.D. Cal./N.D. Cal. Jan. 12, 2010) (Reproduced as Addendum (Add.1-10), hereto). The three-judge court's order reaffirmed the 137.5% population cap set forth in its August 4, 2009 prisoner release order, see Add.2-3, and imposed a schedule by which the population reductions must be achieved, *id.* ¶ 1, at Add.5-6; see also *id.* ¶ 6, at Add.8 (staying *sua sponte* the effective date of the order pending this Court's review of this appeal). If there were ever any doubt about when this Court should intervene in this litigation, this order eliminates it. The Court should note probable jurisdiction and decide the validity of the three-judge court's prisoner release order.[1]

---

[1] The State will be filing notices of appeal from the January 12, 2010 order in the respective district courts. Because that order does nothing more than clarify the August 4, 2009 order under review and the arguments for reversal remain the same, the Court can simply hold the appeal from the January 12, 2010 order pending disposition of the present appeal.

CONCLUSION

The Court should note probable jurisdiction and deny appellees' motion for summary affirmance.

Respectfully submitted,

EDMUND G. BROWN JR.
ATTORNEY GENERAL OF CALIFORNIA
JAMES M. HUMES
CHIEF DEPUTY ATTORNEY GENERAL
MANUEL M. MEDEIROS
STATE SOLICITOR GENERAL
GORDON BURNS
DEPUTY SOLICITOR GENERAL
JONATHAN L. WOLFF
ROCHELLE C. EAST
SENIOR ASSISTANT ATTORNEYS GENERAL
KYLE A. LEWIS
DANIELLE F. O'BANNON
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JERROLD C. SCHAEFER
PAUL B. MELLO
S. ANNE JOHNSON
SAMANTHA D. WOLFF
RENJU P. JACOB
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants

*Counsel of Record

January 14, 2010

ADDENDUM

ADDENDUM

IN THE UNITED STATES DISTRICT COURTS FOR THE EASTERN DISTRICT OF CALIFORNIA AND THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES

PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE

[Filed 01/12/10]

No. CIV S-90-0520 LKK JFM P
THREE-JUDGE COURT

RALPH COLEMAN, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

No. C01-1351 TEH
THREE-JUDGE COURT

MARCIANO PLATA, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

ORDER TO REDUCE PRISON POPULATION

On August 4, 2009, this three-judge court issued an Opinion and Order finding, by clear and convincing evidence, that crowding is the primary cause of the constitutional inadequacies in the delivery of medical and mental health care to California inmates and that no relief other than a "prison release order," as that term is broadly defined by the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(g)(4), is capable of remedying these constitutional deficiencies. We further concluded that relief requiring the State to reduce the population of its thirty-three adult prisons to 137.5% of their total design capacity was narrowly drawn, would extend no further than necessary to correct the violation of California inmates' federal constitutional rights, and was the least intrusive means necessary to correct that violation. Accordingly, in consideration of this court's limited role and the State's "wide discretion within the bounds of constitutional requirements," *Bounds v. Smith*, 430 U.S. 817, 832-33 (1977), we ordered the State to provide "a population reduction plan that will in no more than two years reduce the population of the CDCR's adult institutions to 137.5% of their combined design capacity." Aug. 4, 2009 Opinion and Order at 183. As required by the PLRA, we also gave "substantial weight to any adverse impact on public safety or the operation of a criminal justice system," 18 U.S.C. § 3626(a)(1)(A), and determined, based on the evidence presented at trial, that means exist by which the defendants can accomplish the necessary population reduction without creating an adverse impact on public safety or the operation of the criminal justice system.

The State submitted a proposed prison population reduction plan on September 18, 2009, but that

proposed plan would have reduced the prison population to only 166% of design capacity in two years absent further legislation, and 151% of design capacity in two years if all of the proposals were granted legislative approval. Defs.' Sept. 18, 2009 Plan at 15, 19 (tables showing projected prison populations and crowding rates based on defendants' proposed population reduction mechanisms). Because the plan that the State provided did not comply with our August 4, 2009 Order, we rejected the plan and ordered the State to submit a revised population reduction plan that complied with our August 4 Order. On November 12, 2009, the State timely submitted a revised plan. In accordance with our Orders, this revised plan proposed measures estimated to reduce the prison population to the required 137.5% of design capacity by December 2011.

On December 7, 2009, plaintiffs agreed that the State's revised plan satisfied the requirements of our August 4, 2009 Order and proposed that we enter an order requiring the defendants to achieve the six-month population reduction benchmarks set forth in the revised plan without ordering implementation of any specific population reduction measures. We agree that such an order is appropriate because it would afford the State maximum flexibility in its efforts to achieve the constitutionally required population reduction.

As defendants and county intervenors observe in their December 18, 2009 replies to plaintiffs' response, we have not evaluated the public safety impact of each individual element of the State's proposed plan. However, the evidence presented at trial demonstrated that means exist to reduce the prison population without a significant adverse

impact on public safety or the criminal justice system. Certain of the measures suggested by the State, such as raising the threshold for grand theft and limiting the maximum sentence for certain enumerated felonies to 366 days to be served in county jail, were not included within the means we considered in our August 4 Opinion and Order, and were thus not evaluated from the standpoint of public safety. We noted, however, that they had previously been endorsed by state officials, and thus, presumably, "would not have an adverse effect on public safety." Aug. 4, 2009 Opinion and Order at 156. Certain measures that we concluded would substantially reduce the prison population that we did evaluate positively from a public safety standpoint, such as changes with respect to the churning of technical parole violators, appear to be included only in part in the State's plan. We believe, as we did when we issued our prior Order, that it is appropriate for the State to exercise its discretion in choosing which specific population reduction measures to implement, and, in doing so, to bear in mind the necessity for ensuring the public safety. We are satisfied that, as we previously held, the reduction in prison population that we have ordered can be implemented safely and trust that the State will comply with its duty to ensure public safety as it implements the constitutionally required reduction. Should the State determine that any of the specific measures that it has included in its plan cannot be implemented without significantly affecting the public safety or the criminal justice system, we trust that it will substitute a different means of accomplishing the constitutionally required population reductions.

We emphasize here that we are not endorsing or ordering the implementation of any of the specific measures contained in the State's plan, only that the State reduce the prison population to the extent and at the times designated in this Order. We also emphasize that we do not intend by this Order to prohibit the State from taking actions that may have the effect of reducing the prison population, whatever their impact on public safety, should those actions be taken for reasons other than compliance with our Order.

The concerns that county intervenors express regarding funding may have merit. Counties may well require additional financial resources from the State in order to ensure that no significant adverse public safety impact results from the State's population reduction measures. Counties may, for example, need additional financial resources in order to fund the additional costs of ongoing rehabilitation, re-entry, drug or alcohol, educational, and job training programs. Reducing the number of persons it imprisons should result in significant savings to the State. We do not now decide whether and to what extent the State should allocate part of its savings from such reductions to the counties; instead, we note that whether public safety requires such a reallocation demands serious consideration by the State, both under its general responsibilities to the public and in accord with the PLRA.

In light of all of the above, as well as our August 4, 2009 Opinion and Order, IT IS HEREBY ORDERED that:

1. In accordance with the figures in defendants' November 12, 2009 revised population reduction plan, defendants shall reduce the population of California's thirty-three adult prisons as follows:

a. To no more than 167% of design capacity by six months from the effective date of this Order.

b. To no more than 155% of design capacity by twelve months from the effective date of this Order.

c. To no more than 147% of design capacity by eighteen months from the effective date of this Order.

d. To no more than 137.5% of design capacity by twenty-four months from the effective date of this Order.

"Design capacity" for purposes of these benchmarks may not remain static. For example, an increase in design capacity through construction would decrease the number of inmates by which the prison population must be reduced. Conversely, a decrease in design capacity, such as would result from the closing of a prison, would increase the numeric reduction required.

2. All population reduction measures undertaken by defendants must comply not only with our Orders and the PLRA, but also with any relevant orders entered by other courts, including the individual *Plata* and *Coleman* courts.

3. Within fourteen days following each of the deadlines described above, defendants shall file a report advising the court whether the estimated population reduction has been achieved. This report shall include the total reduction in the population of California's adult prisons that has been achieved; the current population of those institutions, both in absolute terms and as a percentage of design capacity; and the reductions associated with each of the individual measures that defendants described in their November 12, 2009 plan as well as any additional or alternative population reduction

measures that it may have subsequently adopted. If the State has failed to achieve the required population reduction, defendants shall advise the court as to the reasons for such deficiency and what measures they have taken or propose to take to remedy it. They also shall advise the court as to whether such deficiency could have been avoided by the exercise of executive authority, such as that invested in the Governor and other officials by the California Emergency Services Act. Finally, defendants shall advise the court whether legislative changes are required to remedy any deficiency and, if so, what efforts defendants have made to obtain such changes, including specific proposals made to the legislature and the legislative responses to such proposals. Defendants are advised that we may also order the submission of interim reports informing the court of what specific tasks defendants intend to undertake during each six-month period and the specific persons responsible for executing those tasks.

4. If, at any time, the State believes that the waiver of state law by this court is necessary to permit it to meet any of the above population reduction deadlines, defendants shall promptly file a statement with this court, explaining the reasons that they believe such waiver to be necessary; whether they have considered and rejected all other available remedies; if they have rejected such remedies, the reasons therefor; and why the proposed waiver is permissible under the PLRA and the Constitution of the United States.

5. To the extent that population reduction measures implemented by the State increase the need for re-entry, rehabilitation, education, job training or other community services provided by the counties, or necessitate other measures be under-

taken by such counties, defendants shall, in cooperation with the counties, calculate the amount of additional funds that the counties may require from the State in order to maintain the level of public safety at or about the existing level. Within thirty days of the effective date of this Order, defendants shall file with this court a statement setting forth (1) the amounts agreed upon or, should there be no agreement, the parties' respective positions as to such amounts, and (2) what steps defendants have taken or plan to take to fulfill their obligations to the counties in connection with the implementation of the prison population reduction measures, including the allocation to the counties of a portion of any budgetary savings resulting from such implementation. It would be in the interest of both the State and the counties to commence such discussions prior to the effective date of this Order.

6. The effective date of this Order is STAYED pending the United States Supreme Court's consideration of the appeal of our August 4, 2009 Opinion and Order and any appeal of this Order. Unless this Order is rendered moot by the Court's disposition of any such appeal, the effective date of this Order shall be the day following the final resolution by the Court of a timely-filed appeal of this Order or, if no such appeal is filed, the later of the day following the expiration of defendant's time for filing an appeal and the day following the Court's final resolution of the appeal of our August 4 Opinion and Order.

7. We note that this stay grants the State additional time in which to reduce the population of its adult prisons, which Defendant Governor Arnold Schwarzenegger has proclaimed are in a state of emergency due to overcrowding. *See* Ex. P1 (Oct. 4, 2006 Prison Overcrowding State of Emergency

Proclamation). In addition, the stay affords defendants the time and opportunity to seek legislation enacting those prisoner population reduction measures that they proposed in their November 12, 2009 revised plan, but asserted that they lacked the authority to implement. We also note that defendants represented in their November 12, 2009 plan that they would seek legislation affording them such authority. Accordingly, within fourteen days of the effective date of this Order, defendants shall file a report advising this court whether they have obtained the requisite authority for such measures or for other alternative measures that would achieve equal or greater reductions in the prison population, and, if not, what efforts they have made towards obtaining such authority, including what specific proposals they have made and what specific responses have been received from the legislature, if any.

As we have repeatedly stated, we do not intervene lightly in the State's management of its prisons. However, the State's long-standing failure to provide constitutionally adequate medical and mental health care to its prison inmates has necessitated our actions, and our prison population reduction Order is the least intrusive remedy for the constitutional violations at issue. We reiterate our "hope that California's leadership will act constructively and cooperatively . . . so as to ultimately eliminate the need for further federal intervention." Aug. 4, 2009 Opinion and Order at 182. We do, however, necessarily reserve the right, and indeed we have the obligation, to order additional steps to implement our August 4 Order should the actions taken by the State fail to meet any six-month reduction goal set forth in this Order.

IT IS SO ORDERED.

DATED: 01/12/10

/s/STEPHEN REINHARDT

STEPHEN REINHARDT
UNITED STATES CIRCUIT JUDGE
NINTH CIRCUIT COURT OF APPEALS

DATED: 01/12/10

/s/LAWRENCE K. KARLTON

LAWRENCE K. KARLTON
SENIOR UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF CALIFORNIA

DATED: 01/12/10

/s/THELTON E. HENDERSON

THELTON E. HENDERSON
SENIOR UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF CALIFORNIA

No. 09-416

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IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,
Appellants,

v.

MARCIANO PLATA AND RALPH COLEMAN, *et al.*,
Appellees.

Appeal from the United States District Courts for the Eastern District of California and the Northern District of California

BRIEF OPPOSING JOINT MOTION TO DISMISS OR AFFIRM

EDMUND G. BROWN JR.
ATTORNEY GENERAL OF CALIFORNIA
JAMES M. HUMES
CHIEF DEPUTY ATTORNEY GENERAL
MANUEL M. MEDEIROS
STATE SOLICITOR GENERAL
GORDON BURNS
DEPUTY SOLICITOR GENERAL
JONATHAN L. WOLFF
ROCHELLE C. EAST
SENIOR ASSISTANT ATTORNEYS GENERAL
KYLE A. LEWIS
DANIELLE F. O'BANNON
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

Counsel for Appellants

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JERROLD C. SCHAEFER
PAUL B. MELLO
S. ANNE JOHNSON
SAMANTHA D. WOLFF
RENJU P. JACOB
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants

*Counsel of Record

December 22, 2009

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BRIEF OPPOSING JOINT MOTION TO DISMISS OR AFFIRM

The State's jurisdictional statement showed that probable jurisdiction should be noted because this appeal was properly taken from a three-judge court order granting injunctive relief under the Prison Litigation Reform Act ("PLRA"), and should be heard in full because the first-ever contested "prisoner release order" under the PLRA raises substantial legal issues. That order imposes a hard population cap on California's overall prison population, requiring a reduction by tens of thousands of inmates within two years.

Appellees contend that this Court lacks jurisdiction over this appeal because there is no "prisoner release order." Mot. 8-10. The lower court's own descriptions of its order belie that assertion: "[W]e order defendants to reduce the prisoner population to 137.5% of the adult institutions' total design capacity." J.S. App. 169a; see 18 U.S.C. § 3626(g)(4). Moreover, a "prisoner release order" is not essential to jurisdiction. Rather, this Court has jurisdiction over an appeal from any three-judge court order imposing injunctive relief, which the order below does.

Appellees' alternative request for summary affirmance should be denied. Mot. 10-37. This litigation is of profound importance. See J.S. 11-13, 32-34; Mot. 1, 13, 36. The very fact that the order on appeal will require California to reduce its prison population by nearly one third is reason enough for plenary review. Add to that the damage to core principles of federalism and separation of powers embodied in a federal court order that undermines a state executive branch's ability to operate its correctional facilities and the legislature's authority

to order its budget priorities and the suggestion of summary affirmance is incredible. Notwithstanding appellees' suggestions that this case should be summarily affirmed because it is assertedly fact-bound, it implicates important questions of statutory construction. At the end of the day, Congress placed appellate review directly in this Court for precisely a case like this one. Probable jurisdiction should be noted, and the motion to summarily affirm should be denied.

I. THIS COURT HAS JURISDICTION.

Appellees move to dismiss the appeal as premature. Mot. 8-10, 29-32. It is not. This Court's mandatory appellate jurisdiction has attached, the questions presented are ripe, and appellees' prudential concerns are unavailing.

1. Appellees' principal argument is that the order under review "is not a prisoner release order." *Id.* at 8. That would surprise the court that issued it. The three-judge court's own characterizations make clear that the order falls within the definition of a "prisoner release order." 18 U.S.C. § 3626(g)(4) ("any order ... that has the purpose or the effect of reducing or limiting the prison population"); see J.S. App. 169a ("[W]e order defendants to reduce the prisoner population to 137.5% of the adult institutions' total design capacity."); *id.* at 162a (the "prisoner release order set forth below"); *id.* at 253a ("the population cap we order here"); *id.* at 12a (the "order requir[es] ... a population cap"). None of the further proceedings contemplated by the three-judge court will reconsider the "order ... to reduce the prisoner population." *Id.* at 169a.

Furthermore, even if the order were not a "prisoner release order," appellees concede (Mot. 30) that this

Court has jurisdiction over *any* order "granting ... an interlocutory or permanent injunction in any civil action." 28 U.S.C. § 1253. The order imposed mandatory injunctive relief by "requir[ing] the State to develop [and submit] a plan for reducing the prison population." Mot. 8; see J.S. App. 255a-256a. Because the State was "hardly ... free to decline to prepare [and develop the plan]," the order's "coercive ... effect[s]" bring it within § 1253. *Aberdeen & Rockfish R.R.* v. *S.C.R.A.P.*, 422 U.S. 289, 307-08 (1975); cf. *United States* v. *Alabama*, 828 F.2d 1532, 1536-37 (11th Cir. 1987) (per curiam) (28 U.S.C. § 1291 jurisdiction existed despite lack of final remedial plan, because order under review was "specific[], detail[ed], and comprehensive[]" and resolved the issues on appeal); *Frederick L.* v. *Thomas*, 557 F.2d 373, 380-81 (3d Cir. 1977) (same, because submission of plan would "not clarify the questions on appeal"). Indeed, appellees argued below that the State's alleged violation of the injunctive requirements warranted civil contempt sanctions and *the appointment of a criminal prosecutor*. Pls.' Resp. at 8, 14-15, No. C01-1351-TEH (filed N.D. Cal. Oct. 8, 2009) (Docket No. 2256); see also Mot. 8-9.

Finally, although appellees raise the specter of "piece-meal appellate review" and "splinter[ed] appellate proceedings," Mot. 9, they cannot identify a single issue pending before the three-judge court that might hinder meaningful review of the questions presented here or lead to reexamination of the population cap below. There are none. No further proceedings will be had on whether: (1) the three-judge court was properly convened, (2) "'crowding'" was the "'primary cause of the violation of a Federal right,'" or (3) the 137.5% cap satisfied the PLRA's

nexus and narrow tailoring requirements. J.S. i. Although appellees vaguely suggest that the three-judge court's consideration of their comments on the State's population reduction plan might be relevant to this appeal, they fail to mention that they asserted below that the State's court-ordered proposal satisfied the requirements of the court's order. Pls.' Resp. Population Reduction Plan at 1, No. C01-1351-TEH (filed N.D. Cal. Dec. 7, 2008) (Docket No. 2280). There is simply nothing more that must be done to prepare this case for this Court's review.

Therefore, consistent with the purposes of 28 U.S.C. § 1253, the present posture of the case ensures that review of the questions presented will: be meaningful; "accelerat[e] a final determination on the merits"; and minimize the potential for "disruption of state ... regulatory programs caused by the outstanding injunction." *Swift & Co.* v. *Wickham*, 382 U.S. 111, 119-20 (1965).

2. Additionally, appellees assert that this Court lacks jurisdiction to consider whether the three-judge court was properly convened and thus had jurisdiction to issue the prisoner release order, and that the State instead can raise this issue only by appeal to the Ninth Circuit and then *certiorari*. Mot. 29-32. This argument is meritless. Whether the single-judge courts erred in holding that a three-judge court could be convened not only is intertwined with whether the three-judge court could grant a prisoner release order, it is logically anterior and thus properly presented. *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2348 n.1 (2009); see *Missouri* v. *Jenkins*, 515 U.S. 70, 84 (1995) ("permissible scope of the District Court's remedial authority" was anterior). One of the PLRA's purposes is to ensure that no prisoner release order will issue unless the

requirements for convening a three-judge court are met, and it would defeat that purpose if this Court's review of such an order could not even examine whether those statutory prerequisites are satisfied.[1] Indeed, appellees' interpretation encourages precisely the "piece-meal" review about which they otherwise claim concern.

Moreover, appellees' argument directly conflicts with the position that they took before the Ninth Circuit when the State, in fact, immediately appealed the single-judge courts' orders empanelling the three-judge court. See J.S. 7 n.2 (noting dismissal of appeals). Appellees argued that the orders were not appealable because they "d[id] not resolve a 'collateral' matter separate from the merits of the action," but instead "[we]re *'directly intertwined' with the ultimate claims* in the cases." Mot. Dismiss at 14, No. 07-16361 (filed 9th Cir. Aug. 19, 2007) (emphasis added). Appellees also asked the Ninth Circuit to dismiss the appeals because "the Orders will be fully reviewable if and when the three-judge court were to *issue relief such as an injunction or a prisoner release order*." *Id.* (emphasis added). Appellees should not

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[1] This holds regardless of whether the PLRA's requirements for convening a three-judge district court are "procedural" or "jurisdictional." Mot. 29-30; *cf.* Vickie C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 Geo. L. J. 2445, 2445 & n.1, 2447 & n.11, 2450 n.26 (1998) (suggesting that prerequisites to convening three-judge court are jurisdictional); 18 U.S.C. § 3626(a)(3)(C)-(D) (provisions governing convening three-judge courts incorporate subparagraph (A), which is directed at courts); *Lindh* v. *Murphy*, 521 U.S. 320, 344 (1997) (Rehnquist, C.J., dissenting) ("[T]he most salient characteristic of jurisdictional statutes [is that their] commands are addressed to courts rather than to individuals.").

be permitted to disavow these positions now. See *Coleman* v. *Schwarzenegger*, No. 07-16361, 2007 WL 2669591 (9th Cir. Sept. 11, 2007) (per curiam) (adopting appellees' position); *New Hampshire* v. *Maine*, 532 U.S. 742, 749-51 (2001) (discussing judicial estoppel).

Appellees' motion to dismiss should be denied.

II. THE MOTION FOR SUMMARY AFFIRMANCE SHOULD BE DENIED.

1. In arguing against full review, appellees suggest that summary affirmance would have "no significant impact" on PLRA litigation because this Court "'gives less deference to [its] summary dispositions.'" Mot. 36. But this misses the point.

Relevant here is the sway that affirmance of this unprecedented release order would have over the *lower courts*. J.S. 11-12, 34 (discussing, *inter alia*, *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975)). On that point, appellees offer no response. A summary affirmance would give the three-judge district court's decision enormous influence. See *Hicks*, *supra*; *United States* v. *Blaine County, Mont.*, 363 F.3d 897, 904 (9th Cir. 2004) (rejecting argument that this Court's summary affirmance of three-judge district court did not bind the Ninth Circuit). For the first time, a court ordered prisoner release over an objection under the PLRA, and that extraordinary order will impact tens of thousands of prisoners. Summary affirmance here would be relied upon as authority for courts presiding over PLRA cases to short-circuit a defendant's ongoing efforts to implement the plans of a special master or receiver and to adopt the misguided approach the court below employed in capping the State's prison population at 137.5% of design capacity.

2. Appellants also urge summary affirmance on each individual question presented, contending that the answers to each question are too fact-bound to warrant this Court's attention. That is wrong. The trial record's length does not diminish the substantiality of the legal questions presented. But even if the issues were inherently limited in their impact to the parties here, that would be no reason for the Court to abdicate its duty to perform its exclusive appellate function that Congress has assigned to it.

a. The first question presented turns on the appropriate interpretation of § 3626(a)(3)(A)'s requirement that a defendant have "had a reasonable amount of time to comply with the previous court orders." The court below was the first to apply the requirement and to find a three-judge court properly convened over a party's objection. Appellees make much of the many remedial orders issued by the single-judge courts throughout the litigation. Mot. 32-35. Yet, they effectively ignore the legal issues presented regarding the contours of the "reasonable amount of time requirement." See J.S. 14-18. Important questions surround whether a three-judge court is properly convened under the PLRA *whenever* a single-judge district court can point to some past period during which the defendant did not comply with court orders. The issue is particularly acute in this case where, as one district court itself acknowledged, "'commendable'" progress subsequently has been made (even though the underlying violations of federal law have not been completely remedied). J.S. App. 294a, *quoted in* J.S. 17.[2] These

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[2] The State's positions here and in the Ninth Circuit are consistent. *Contra* Mot. 35-36. In the Ninth Circuit, the State has preserved claims that the PLRA does not authorize

are substantial questions that are fundamental to Congress's intent to ensure that prisoner release orders are remedies of "last resort."

b. The jurisdictional statement showed that the second question is substantial because no other court has ever interpreted the PLRA's "primary cause" requirement, and Congress offered little guidance. J.S. 18-19; see generally *Walling* v. *A.H. Belo Corp.*, 316 U.S. 624, 631 (1942) (interpretation of statutory term is a "question of law"). Appellees' argument that summary affirmance would be appropriate because the court below adopted and correctly applied the State's definition is misleading, compare Mot. 18, with J.S. App. 268a ("[a]ccepting, *arguendo*, Defendants' definition of 'primary'"), and wrong. The State always has contended that "primary cause" cannot be divorced from the command that "prisoner release" must "*remedy* the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E)(ii) (emphasis added); see J.S. 21-23; Defs.' Mem. Supp. Mot. Dismiss at 17-18, No. C01-1351-TEH (filed N.D. Cal. Sept. 15, 2008) (Docket No. 1479).[3] But the court below conceded that relief directed at crowding would

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receiverships. *See id.* at 35. No matter how that issue is resolved, the State's position is that *any* remedial measures (whether imposed by a single-judge court acting alone, or in concert with a special master or receiver) must satisfy § 3626(a)(3)(A)(ii)'s "reasonable amount of time" requirement.

[3] Appellees' suggestion (Mot. 18) that the State forfeited this statutory construction issue is baseless. *See Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) ("'a party can make any argument in support of [a federal] claim; parties are not limited to the precise arguments they made below'"); *U.S. Nat'l Bank* v. *Indep. Ins. Agents*, 508 U.S. 439, 446 (1993) ("'[T]he court ... retains the independent power to identify and apply the proper construction of governing law[.]'").

not remedy the violation, J.S. App. 134a, 143a, and appellees still offer no response on this point.

Furthermore, appellees fail to meet even the proposed legal standard for which they advocate. See Mot. 19-20. Appellees' argument that the "primary cause" requirement was satisfied because the order was "*necessary* but not *sufficient* to remedy the violation," *id.* at 20, cannot be reconciled with their expert's concession that the alleged violations could be remedied *without addressing overcrowding.* J.S. 23. In short, the population cap is neither necessary *nor* sufficient.

Additionally, the State's showings on this point were significantly hindered by its inability to collect and introduce evidence regarding changed circumstances. *Contra* Mot. 20-23. For instance, although the Receiver and the Special Master had suggested that other reforms were more important to remedying the alleged violations and progress was being made along those lines, see, *e.g.*, J.S. 16-17, 22 & n.6; Intervenors' J.S. 9-10, the court prohibited the State from obtaining discovery from them or calling them to testify at trial. Having deprived the State of important evidence from the Receiver and the Special Master about the ongoing reforms and the current state of the alleged violations, any findings regarding "primary cause" and nexus (see *infra*) are suspect. See generally *Coleman/Plata*, No. C01-1351-TEH, slip op. at 21:22-25 (N.D. Cal. Aug. 4, 2009) (Docket No. 2197) (recognizing the Receiver's progress); Special Master Report at 6-7, 355-56, No. CIV-S-90-0520 (E.D. Cal. filed Sept. 12, 2008) (Docket No. 3029) (discussing improvements).

c. The third question falls within the heart of this Court's jurisprudence on prison conditions, see, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 357-63 (1996); *id.* at

385-92 (Thomas, J., concurring), and the limitations on equitable remedies for unconstitutional conditions, see *id.* at 359-63; *Jenkins*, 515 U.S. at 98. The court below admitted that it was using a systemwide remedy to address alleged violations affecting only a subset of the prison population. J.S. App. 172a; *contra Jenkins*, *supra*; *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977) ("[O]nly if there has been a systemwide impact may there be a systemwide remedy."). And it imposed a hard population cap based on an interest in improving the prisons' efficiency and functionality, not the underlying alleged constitutional violations. See J.S. 29-30. Nonetheless, appellees suggest that summary affirmance would be appropriate because the State has "flexibility" in implementing systemwide relief. Mot. 24.

This is no answer. The order is not "flexible." It imposes a hard cap of 137.5% of design capacity on the State's entire prison population under a time frame the State does not control. The State's ability to tinker at the margins with how the cap will be imposed does not make the order comparable to those in the cases relied upon by appellees. Compare *Bounds* v. *Smith*, 430 U.S. 817, 818-19, 821-22 (1977) (injunction merely required state to "'devis[e] a Constitutionally sound program' to assure inmates access to the courts," a constitutional right enjoyed by *all* prisoners).

Appellees also argue that the systemwide 137.5% cap can be summarily affirmed because the State failed to show what alternative cap should apply. Mot. 25-26. They cite no authority, however, for the novel proposition that the non-movant must demonstrate how narrow any injunctive relief must be. To the contrary, because "the scope of injunctive

relief is dictated by the extent of the violation established," the burden falls upon the movant. *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); see *Milliken* v. *Bradley*, 418 U.S. 717, 744-45 (1974) (reversing interdistrict injunction because plaintiffs made a deficient record on scope).

Moreover, the State *does* contend that either the 137.5% or 130% figures would provide the "*wrong* cap." *Contra* Mot. 25. *Neither* number was sufficiently tied to the complained-of *constitutional violations* rather than a nebulous desire that the prisons "'function properly.'" See J.S. 29-31; see also J.S. App. 179a-181a (discussing 130% cap as the "federal standard[] for prison overcrowding"). And the court's misinterpretation of § 3626(a)(3)(E)(ii)'s "primary cause" and "remedy" requirements illustrates why either number would be "wrong." *Supra* at 8-9. Any analysis of whether the relief ordered satisfies the nexus and narrow tailoring requirements is misguided if that relief will not remedy the underlying alleged violation.

Finally, the limitations on the State's ability to gather and present evidence on changed conditions undermines the nexus holding. Contrary to appellees' suggestion that current conditions are irrelevant because the State has not moved to terminate proceedings, Mot. 20, any improvement in conditions would necessarily alter the nexus analysis. Assuming *arguendo* that overcrowding is the primary cause of the remaining violations and that *some* population cap is required to remedy them, the cap's size must be tied to the outstanding violations. At a minimum, the issue deserves plenary consideration.

CONCLUSION

The Court should note probable jurisdiction and deny appellees' motion for summary affirmance.

Respectfully submitted,

EDMUND G. BROWN JR.
ATTORNEY GENERAL OF CALIFORNIA
JAMES M. HUMES
CHIEF DEPUTY ATTORNEY GENERAL
MANUEL M. MEDEIROS
STATE SOLICITOR GENERAL
GORDON BURNS
DEPUTY SOLICITOR GENERAL
JONATHAN L. WOLFF
ROCHELLE C. EAST
SENIOR ASSISTANT ATTORNEYS GENERAL
KYLE A. LEWIS
DANIELLE F. O'BANNON
DEPUTY ATTORNEYS GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

CARTER G. PHILLIPS*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JERROLD C. SCHAEFER
PAUL B. MELLO
S. ANNE JOHNSON
SAMANTHA D. WOLFF
RENJU P. JACOB
HANSON BRIDGETT LLP
425 Market Street
26th Floor
San Francisco, CA 94105
(415) 777-3200

Counsel for Appellants

*Counsel of Record

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